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Second-class postage paid at Washington, D.C. and additional mailing office

Postmaster: If undeliverable, send notice on Form 3579 to: American Journal
of International Law

2223 Massachusetts Ave., N.W. Washington, D.C. 20008

Printed by Lancaster Press, Lancaster, Pa. 17604

Editorial office: New York University School of Law, New York, N.Y. 10012

CUE - H026 79 - 111 - P004300

AMERICAN JOURNAL OF INTERNATIONAL LAW

341.05

Am 35

VOL. 81

January 1987



NO. 1

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Manuscripts in triplicate may be sent to the Editor in Chief of AJIL, Professor Thomas M. Franck, New York University School of Law, New York, N.Y. 10012. All footnotes should be typed double space at the end of the manuscript. Please do not make multiple submissions to other journals. Subscriptions, orders for back numbers, correspondence with reference to AJIL and books for review should be sent to the AMERICAN JOURNAL OF INTERNATIONAL LAW (ISSN 0002-9300), 2223 Massachusetts Avenue, N.W., Washington, D.C. 20008.

AJIL is published in January, April, July, and October and is supplied to all members of the American Society of International Law. The annual subscription to nonmembers of ASIL is \$50.00, plus \$4.00 for all foreign subscriptions. Available back numbers of AJIL will be supplied at \$15.00 each. (\$30 of membership fee is allotted to AJIL subscription.)

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40 WASHINGTON SQUARE SOUTH
NEW YORK, N.Y. 10012

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2223 MASSACHUSETTS AVENUE, N.W.
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EVIDENCE, THE COURT, AND THE NICARAGUA CASE

By Keith Highet*

If you get all the facts you can be right; if you don't get all the
facts, you can't be right.

Bernard Baruch†

INTRODUCTION

THE NICARAGUA DECISION

The decision in the *Nicaragua* case¹ is one of the most important judgments ever delivered by the International Court. It is by far the "heaviest" case, in the parlance of the English barrister, ever decided by the Court in the absence of a party. It has broken new ground for the application of Article 53 of the Statute.² It deals in detail with the multilateral treaty reservation of the United States (the "Vandenberg amendment").³ It contains provocative reasoning about the genesis and maintenance of rules of customary international law, separate from treaties such as the United Nations Charter.⁴ It contains seminal findings on the use of force and the exercise of the inherent right of self-defense under Article 51 of the Charter.⁵ It presents fresh and doubtless controversial interpretations of the principle of nonintervention.⁶ It prescribes limits to "collective counter-measures" in response to conduct not deemed to amount to "armed attacks."⁷

The length of the *Nicaragua* decision, its scope, and its detail are striking. Moreover, it is accompanied by one of the most closely reasoned and yet

* President, American Society of International Law, and member of the New York and District of Columbia Bars. The author has served as counsel, counsel and advocate, or adviser in a number of cases before the International Court since 1963: the *South West Africa Cases* (Second Phase); the *Case Concerning the Continental Shelf (Tunisia / Libyan Arab Jamahiriya)* and the *Application of Malta to Intervene* in that case; the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya / Malta)* and the *Application of Italy to Intervene* in that case; and the *Application for Revision and Interpretation of the Judgment of 24 February 1982*. Some parts of this article were prepared in contribution to the work of the special ASIL Panel on the International Court of Justice, which received the valued support of the Ford Foundation.

† St. Louis Post-Dispatch, June 21, 1965. This remark is also recalled in a more pithy formulation: "Get the facts or the facts will get you."

¹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27) [hereinafter cited as *Nicaragua Merits*].

² *Id.* at 23-25, paras. 26-30.

³ *Id.* at 29-38, paras. 37-56; and at 92-97, paras. 172-82.

⁴ *Id.* at 92-97, paras. 172-82.

⁵ *Id.* at 98-106, paras. 187-201; and at 118-23, paras. 227-38.

⁶ *Id.* at 106-10, paras. 202-09; and at 123-26, paras. 239-45.

⁷ *Id.* at 110-11, paras. 210-11; and at 126-27, paras. 246-49.

impassioned dissenting opinions ever to be appended to a decision of the Court: that of Judge Stephen Schwebel of the United States, who wrote a total of 261 printed pages.⁸

How will the *Nicaragua* case be remembered by international lawyers in future years: for example, as is now true with the *Corfu Channel* case, almost 40 years hence? *Corfu* is now recalled as a somewhat analogous (although far more finite) litigation, also involving complex facts; but in that case the respondent Albania only withdrew in the second (compensation) phase⁹ of the proceedings, not in the critical merits phase.¹⁰ The *Nicaragua* case will probably be recalled—in the year 2027—as representing at least the following new developments: a decisive and controversial victory of a small power over a great power; an unprecedented withdrawal from proceedings, to the subsequent regret of the withdrawing party; one of the first considerations by the Court of armed conflict, and surely the first when that conflict, to one degree or another, was continuing; the pronouncement of a controversial precedent on the use of force, intervention and the right of collective self-defense in response to armed attack; and, for the first time, treatment by the Court of such a complex set of facts presented as foundation for a decision, and moreover, their substantially unilateral treatment, in the absence of the defending party, and with the Court itself operating as a “counter-advocate” under the strictures and requirements of Article 53.

It is well known that the *Nicaragua* case is complicated, fraught with controversy and highly sensitive. It is founded upon an intricate, shifting and controversial background of factual assertion unprecedented in the Court’s history. The job of the Court would have been difficult enough, even had the United States remained fully in the proceedings and argued extensively on the merits. With the announcement of its withdrawal,¹¹ however, the United States made the job of the Court virtually impossible from a factual point of view and, as some have observed, perhaps effectively foreclosed almost all options other than those adopted by the Court in its judgment.

In fact, the Court—perhaps more dramatically than ever before in its

⁸ Judge Schwebel’s dissenting opinion is composed of an opinion proper (*id.* at 259–394) and a “Factual Appendix” comprising 227 paragraphs (*id.* at 395–527).

⁹ *Corfu Channel (UK v. Alb.) [Assessment of Amount of Compensation]*, 1949 ICJ REP. 244 (Judgment of Dec. 15).

¹⁰ *Corfu Channel (UK v. Alb.)*, Merits, 1949 ICJ REP. 4 (Judgment of Apr. 9).

¹¹ Department Statement, DEP’T ST. BULL., No. 2096, March 1985, at 64, reprinted in 24 ILM 246 (1985). The position adopted by the United States was that it had withdrawn from the case for the variety of reasons set forth in the departmental statement, and that the United States “reserves its rights in respect of any decision by the Court regarding Nicaragua’s claims”—a statement that the Court was quick to rebut in no uncertain terms:

[T]he Court is bound to emphasize that non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. Nor does such validity depend upon the acceptance of that judgment by one party. The fact that a State purports to “reserve its rights” in respect of a future decision of the Court, after the Court has determined that it has jurisdiction, is clearly of no effect on the validity of that decision.

Nicaragua Merits, 1986 ICJ REP. at 23–24, para. 27 (emphasis added).

long history—was placed in a corner.¹² No litigator ever wishes to deny his opponent freedom to negotiate a mutually agreeable solution: the consequences of putting an adversary in a corner can be disastrous. This principle, permitting a *modicum* of adjustment, of freedom of movement, must emphatically be applied—a fortiori—to the tribunal before which the case is being heard. To foreclose favorable consideration by the judges can only bring a bitter harvest.

The decision of the United States to boycott the proceedings therefore may well have blown up in its face. As Judge Sir Robert Jennings stated in his dissenting opinion:

[O]ne is bound to observe that here, where questions of fact may be every bit as important as the law, the United States can hardly complain at the *inevitable consequences* of its failure to plead during the substantive phase of the case. It is true that a great volume of material about the facts was provided to the Court by the United States during the earlier phases of the case. Yet a party which fails at the material stage to appear and expound and explain even the material that it has already provided, *inevitably prejudices the appreciation and assessment of the facts of the case*.¹³

Much of the difficulty that resulted from the nonappearance of the United States in the merits phase of the *Nicaragua* case is in fact attributable to the lack of an advocate in court to defend U.S. policy and to attack the evidence presented by Nicaragua. Thus, Judge Jennings later stated in his dissent that the nonappearance of the United States

has been particularly unfortunate—perhaps not least for the United States—in a case which involves complicated questions of fact; where, in the merits phase, witnesses giving evidence as to the facts were called and examined by counsel for the Applicant, but their evidence was not tested by cross-examination by counsel for the Respondent; and where the Respondent itself provided neither oral nor documentary evidence.¹⁴

¹² Except, perhaps, in the difficult and challenging situation that confronted the Court in 1965 in the merits phase of the *South West Africa Cases* (South West Africa (Ethiopia v. S. Afr.; Liberia v. S. Afr.) (Second Phase), 1966 ICJ REP. 6 (Judgment of July 18)). In that long litigation, however, the Court was not placed in a corner by any actions of the applicants as much as by the unwillingness or inability of half of its judges, inter alia, to square the obligations of the sacred trust (of the mandate for South West Africa) with the actual racial practices of South Africa as mandatory power. (The author served as counsel to Ethiopia and Liberia, the applicants, in the second phase of this litigation.)

¹³ 1986 ICJ REP. at 544 (Jennings, J., dissenting) (emphasis added); see also comments by the present author after the U.S. decision to withdraw from the *Nicaragua* case had been made, in *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79 AJIL 992 (1985).

¹⁴ 1986 ICJ REP. at 528 (Jennings, J., dissenting) (emphasis added); see also Highet, *supra* note 13, at 1000:

As to each element of proof, it could have been argued that for one reason or another it was inappropriate or impossible for the Court to reach a decision or to base a decision upon it. Each witness could have been examined from top to bottom, to attempt to disprove the accuracy of the testimony and the bias of the recollection, and to attempt to illustrate at each turning point in the case that this dispute was not ripe for decision—or was not a dispute as to which the Court was capable of functioning in accordance with its Statute [emphasis added].

The application of Article 53 of the Statute in the *Nicaragua* case effectively served to highlight the importance of the Court's handling of facts. The Court was required to deal with this extraordinarily complex evidence entirely on its own, responding to the arguments and evidence presented by Nicaragua with its own questions (and, in particular, the detailed and painstaking examination from the bench of Judge Schwebel). Moreover—and perhaps just because the respondent United States *was* absent—the Court was obliged to theorize more than it would normally have done to justify the positions it ultimately took on matters of evidence. Rules of evidence were formulated that would clearly not have been necessary had the United States been in the courtroom to defend itself and to assist the Court in evaluating and disposing of the factual assertions made by Nicaragua.

Perhaps because the Court had, in essence, only one side of the case to evaluate, it may also have found itself obliged to render certain rulings and interpretations of law, primarily related to the nature of the right of individual and collective self-defense, that it would not otherwise have been required to reach. By its desire to avoid having the Court deal with the factual and legal issues presented by Nicaragua concerning intervention and the use of force, and to avoid a determination of the justifiability *vel non* of its asserted exercise of self-defense against aggression by Nicaragua, the United States may ironically have made it impossible for the Court to deal with these questions in any way in its favor; for in the absence of the United States, how could El Salvador have seriously considered refreshing its application to intervene, which had been rejected by the Court at the preliminary phases of the case?¹⁵ Would not the vindication of a claim of collective self-defense have required the presence and testimonial of El Salvador?¹⁶

On this assumption, how could the Court reasonably have been expected to test the facts relating to the alleged aggression by Nicaragua against El Salvador (*inter alia*) and the alleged collective self-defense by El Salvador and the United States in response to that aggression? It surely did not require omniscience in 1985 to surmise that once (and since) the Court had accepted jurisdiction, it was essential to press the full case in defense before the Court, no matter what other misgivings might exist concerning the Court's appropriate resolution of the jurisdictional questions. By its absence from the proceedings, then, the United States probably preempted El Salvador from reapplying to intervene, or at least submitting evidence, and this, in turn, prevented any affirmative defense whatever.

Respondent's absence meant, in the simplest terms, that the Court could not possibly have had fully before it the very facts that could have protected

¹⁵ Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Declaration of Intervention, 1984 ICJ REP. 215 (Order of Oct. 4); *see also* Separate Opinion of Judge Lachs to Nicaragua Merits, 1986 ICJ REP. 158, 171.

¹⁶ Yet, in the actual situation, how could El Salvador have proceeded? If its intervention had been allowed, it would have found itself alone in court, without its "champion," the United States (to borrow the felicitous word used by Judge Jennings in his dissent, 1986 ICJ REP. at 545), and would have borne a unique and unacceptably uncomfortable responsibility for the outcome of the case.

the United States, as a matter of evidence, against findings of law such as are contained in the Judgment. The Court was therefore caught in a vicious circle. It was also caught in another: the Court's job under Article 53 was made almost impossible by the complexity of the facts, just as the ability of the Court to deal with those complex facts was rendered almost impossible by the need for the Court to proceed under its Statute. It is a bitter irony.

It is beyond the scope of this article to consider the many other issues of law and tactics presented by the *Nicaragua* case. It is its purpose, however, to consider the overall background and history of the International Court and its predecessor, the Permanent Court, in matters of fact-finding and the gathering, evaluation and disposition of evidentiary material, since the *Nicaragua* case cannot properly be understood in isolation. It must be viewed against the history and practice of the Court.

In particular, that specially important part of the case which concerns the acceptance and disposition of evidence must be seen in perspective, all the more since the Court's handling of the facts received an unprecedentedly strong and detailed dissent by one judge (Judge Schwebel). In addition to appending to his dissent the equivalent of a judicial counter-memorial on the facts,¹⁷ Judge Schwebel dealt *in extenso* with the techniques that the Court had felt obliged to adopt both in dealing with the complex facts presented in the case and in doing so in the absence of the respondent. To understand the Court's decision and the dissent properly, therefore, students of the Court and of international law ought to refresh their recollection of the Court's powers, practices and proclivities in the handling of factual proof and evidentiary questions over its long history.¹⁸

GENERAL CONSIDERATIONS

Article 36 of the Statute establishes the substantive objects of the Court's jurisdiction under the "optional clause."¹⁹ As well as giving the Court power to resolve all legal disputes concerning treaty interpretation and any question of international law, it empowers the Court to determine "(c) *the existence of any fact* which, if established, would constitute a breach of an international obligation."²⁰ This provision, contemplating the Court's dealing with facts, has been in existence since 1920. How has the Court during those 67 years implemented it? What are the Court's powers over facts and evidence? What

¹⁷ See note 8 *supra*.

¹⁸ To this end, one cannot forget the record of the Permanent Court of International Justice, which in its shorter effective life span of 18 years dealt with many intricate questions of fact, although most were resolved by documentary pleading and proof and without taking actual evidence.

¹⁹ Article 36, paragraph 2 of the Statute; although this provision relates only to the type of matters that may be brought before the Court under the optional clause, it also serves as a useful indication of what kinds of matter can be considered as constituting "legal disputes" under Article 36, paragraph 1 of the Statute, which establishes the Court's jurisdiction.

²⁰ The last subparagraph also empowers the Court to determine "(d) *the nature or extent of the reparation* to be made for the breach of an international obligation" under subparagraph (c) of Article 36 (emphasis added).

has its experience been in dealing with such questions?²¹ What has the attitude of states been to its fact-finding powers?

Judge Manley Hudson wrote years ago that "[i]ssues of fact are seldom tried before the Court, and where a question of fact arises the Court must usually base its finding on statements made on behalf of the parties either in the documents of the written proceedings or in the course of oral proceedings."²² Yet fully one-half of the matters specified as being the subject of "legal disputes" within the meaning of Article 36, paragraph 2 of the Statute are factual questions.²³ The Court's power to make factual determinations is not merely derivative from its other powers: it is a basic part of the original purpose for an international court.

Moreover, the Court possesses such sweeping powers²⁴ in the acceptance and evaluation of any and all forms of evidence that it is difficult to prove that it lacks power or ability a priori to cope with any given type of evidence. Determination of which matters are duly justiciable for the Court does not depend on the nature of the evidence that may be laid before it, which may, of course, be insufficient in the context of any given case or may not for substantive reasons be recognized as supporting the burden of proof. The "suitability" of evidence is only relevant to its usefulness in resolving matters before the Court; it does not, in turn, determine the justiciability of a case.²⁵ Otherwise, the production of inadequate evidence could always serve as an argument to defeat jurisdiction.

It should also be made clear at the outset that questions of evidence are only peripherally affected by the nature of the title of jurisdiction. It makes no substantive difference how the parties have come before the Court; there is no meaningful difference in this respect between the operation of the optional clause or a treaty compromissory clause, on the one hand, and that of a *compromis* or special agreement, on the other, save perhaps that by displaying the will to frame a question jointly for the Court, the parties in the latter instance may have greatly reduced the likelihood of disagreement

²¹ What is "evidence"? In Judge Hudson's succinct characterization: "In general it may be said that the term evidence covers real evidence, documentary proofs, and the testimony of witnesses and experts, advanced by a party either on its own motion or at the invitation of the Court." M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942*, at 565 (1943).

²² *Id.*

²³ Its subparagraph (a) deals with "the interpretation of a treaty" and subparagraph (b) with "any question of international law" (this latter perhaps including primarily questions of fact). For (c) and (d), see note 20 *supra* and accompanying text.

²⁴ With one or two logical exceptions, which naturally flow from the overall context and premises of public international law, such as the lack of coercive powers to enforce evidentiary production.

²⁵ As stated crisply by President Spender "in the course of exchanges with counsel" in the *South West Africa Cases*: "the Court is quite able to evaluate evidence, and if there is no value in the evidence then there will be no value given to it." 1965 ICJ Pleadings (10 *South West Africa*) 163, as quoted in D. SANDIFER, *EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* 464 (rev. ed. 1975).

over the scope of the facts to be determined or the nature of the evidence required to prove those facts.²⁶

WHAT CAN THE COURT DO?

POWERS IN GENERAL

The powers of the Court in matters concerning evidence are wide.²⁷ This was equally true of its predecessor. The Statute, which has remained unchanged in all relevant respects since it came into effect in 1921, is broad and flexible in its vision and scope.²⁸ Within the context of adjudicating questions between sovereign states (and necessarily subject in large extent, therefore, to the will of the parties), the Statute contains most powers necessary to secure adequate evidence for the Court's determination of factual issues.²⁹ As Shabtai Rosenne has summarized:

The Court's function in establishing the facts consists in its assessing the weight of the evidence produced in so far as is necessary for the determination of the concrete issue which it finds to be the one which it has to decide. For this reason, there is little to be found in the way of rules of evidence, and a striking feature of the jurisprudence is the ability of the Court frequently to base its decision on undisputed facts,

²⁶ Still, parties to a special agreement may disagree vehemently and in the course of the proceedings about the appropriate meaning or scope of that agreement. See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, 1982 ICJ REP. 18 (Judgment of Feb. 24) [hereinafter cited as *Tunisia/Libya*], in which there was extensive disagreement between the parties over whether the language of the special agreement (originally written in Arabic) meant that the Court was supposed in effect to indicate the delimitation line or merely to enunciate general principles. (The author served as counsel to Libya in this case.) See also the *Borchgrave* case in the Permanent Court, where one party to a special agreement actually filed preliminary objections to the jurisdiction of the Court. *Borchgrave (Belg./Sp.) (Preliminary Objections)*, 1937 PCIJ, ser. A/B, No. 72 (Judgment of Nov. 6).

²⁷ See, e.g., Judge Schwebel's dissenting opinion in *Nicaragua Merits*, 1986 ICJ REP. at 321-22, para. 132:

In the instant case, the Court, in its Judgment on jurisdiction and admissibility of 26 November 1984, observed in response to contentions of the United States about the difficulties of finding the facts in a situation of the ongoing use of force in which security considerations are constraining, that the Court "enjoys considerable powers in the obtaining of evidence" (*I.C.J. Reports 1984*, p. 437). *Under its Statute, the Court does enjoy such powers, as is illustrated by the terms of Article 49 and Article 50.* Given the controversy that surrounded charges by the United States of Nicaragua's support of foreign insurrection and Nicaragua's adamant denial of those charges—despite the evidence in support of those charges that came to light in the oral hearings—it might have been thought that the Court would have chosen to make use of those considerable powers in the obtaining of evidence to which it drew attention at the jurisdictional stage [emphasis added].

²⁸ See M. HUDSON, *supra* note 21, §119, at 128 (1943). See also Sandifer, who writes that the framers of the Statute of the PCIJ and ICJ "followed the existing practice with respect to provisions concerning evidence in agreements establishing ad hoc tribunals and stated only broad principles in the Statute, leaving the elaboration of specific rules to the Court." D. SANDIFER, *supra* note 25, at 39.

²⁹ In the absence of specific agreement thereto by the parties (in, e.g., a bilateral arbitration or claims settlement tribunal), these obviously exclude methods of enforcing the writ of the Court that could ostensibly conflict with local sovereignty, such as the power to issue enforceable subpoenas or to require documentary production.

and in reducing voluminous evidence to manageable proportions. Generally, in application of the principle *actori incumbit probatio* the Court will formally require the party putting forward a claim to establish the elements of facts and of law on which the decision in its favour might be given.³⁰

Although the substantive expectations of 1920 are not those of 1987, the Court's practice concerning evidentiary material—burden of proof, formal rules, propriety and admissibility—has not changed much over the years. The reason is well recognized by commentators: the Court should be left to determine the facts and law as best it can, with the fullest freedom consistent with the expressed will and consent of the sovereign parties that are the subjects of international law. It is clearly the Court's practice to determine for itself the acceptability *vel non* of evidentiary matters, exercising the greatest freedom to evaluate each case on its merits and on its own particular facts.³¹

The parties also share a similar flexibility in their freedom to introduce, more or less, whatever evidence they may consider appropriate to prove their cases. A leading scholar of evidence before international tribunals has stated:

The International Court of Justice has construed the absence of restrictive rules in its Statute to mean that a party may generally produce any evidence as a matter of right, so long as it is produced within the time limits fixed by the Court. . . . In practice, while the Court has placed few restrictions upon the rights of parties to produce whatever evidence they see fit, it has upon occasion exercised its discretionary authority to refuse to accept evidence offered.³²

Judge Anzilotti said, during the drafting of the Rules of Court in 1922, that "the Court had accepted the principle that any evidence produced by the parties should be admitted automatically."³³ Another international scholar with a civil law background has commented that

the almost total absence of restrictions relative to the admissibility of evidence more nearly approaches the continental than the Anglo-

³⁰ 2 S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 580 (1965).

³¹

In these conditions it is necessary to start from the principle already developed in the jurisprudence of the International Court of Justice that the Court is free to appreciate the evidence and the allegations of the Parties. *The Parties are thus in a large measure free to present any evidence that they consider necessary or opportune.*

D. SANDIFER, *supra* note 25, at 464 (quoting the Swiss Memorial in the *Interhandel* case) (emphasis added).

³² D. SANDIFER, *supra* note 25, at 184–85. Professor Sandifer has summarized the picture overall in the following words: "Both Courts have in fact been sparing in the attention and time devoted to evidence. Rather than break new trails or generate new precedents, their practice has proceeded largely within the confines of the system already marked out by ad hoc tribunals." *Id.* at 463.

³³ 1922 PCIJ, ser. D, No. 2, at 210, *cited in id.* at 184 n.26. Eventually, several qualifications to this principle evolved, notably in connection with late or improper submission of documentary evidence without the consent of the other party. *See, e.g.,* note 39 *infra*.

American system. In this regard, the practice of the Court shows that even the absence of relevance is not a sufficient reason, as a general rule, for its rejection. The only limitation is that of late submission.³⁴

Indeed, the Court has long operated with a careful respect for the *onus probandi* of the Roman and civil law systems. The basic rule is one of practicality.

THE STATUTE AND RULES

The Statute of the Court quite naturally supports this freedom of action. Unchanged in relevant part since 1920, it presents a broad framework within which the Court may determine the facts necessary for its decisions.³⁵ Article 48 reserves to the Court plenary powers in connection with the taking of evidence.³⁶ Not only can it "make all arrangements connected with the taking of evidence"; it can also call upon the parties to produce evidence,³⁷ commission inquiries or expert opinions³⁸ and foreclose further production of untimely evidence.³⁹ The Court even has the power to examine witnesses away from the seat of the Court.⁴⁰

³⁴ Lalive, *Quelques Remarques sur la Preuve devant la Cour Permanente et la Cour Internationale de Justice*, 7 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 77, 102 (1950), cited in (and translated by) D. SANDIFER, *supra* note 25, at 185 n.26.

³⁵ The substantive provisions of the Statute relating to evidentiary matters begin with Article 30, paragraph 2, which enables the Court to adopt rules that "may provide for assessors to sit with the Court or with any of its chambers, without the right to vote." Statute of the International Court of Justice, ICJ ACTS AND DOCUMENTS, No. 4, at 60-89 (1978) (French & English). This is implemented by Article 9, paragraph 1 of the Rules, which provides: "The Court may, either *proprio motu* or upon a request made not later than the closure of the written proceedings, decide, for the purpose of a contentious case or request for advisory opinion, to appoint assessors to sit with it without the right to vote." For the Rules of Court adopted on Apr. 14, 1978, see *id.* at 92-161 (French & English), reprinted in 73 AJIL 748 (1979). As Rosenne commented in 1983: "During the political and academic discussions on the role of the Court that have taken place since 1970, attention became focused on the problem of assessors, notwithstanding the fact that no use has ever been made of this faculty." S. ROSENNE, *PROCEDURE IN THE INTERNATIONAL COURT* 31 (1983); see discussion, *id.* at 30-33.

³⁶ "The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence." See S. ROSENNE, *supra* note 35, at 270-71; M. HUDSON, *supra* note 21, §198, at 202. The breadth and flexibility of this provision has enabled the Court to act with a surprising degree of responsiveness to resolve various questions of fact presented to it.

³⁷ Article 49 of the Statute provides: "The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal."

³⁸ Statute, Art. 50.

³⁹ Article 52 of the Statute states: "After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents."

⁴⁰ A provision related indirectly to the inspection possibilities of Article 44 of the Statute and Article 66 of the Rules. Rosenne notes that "[t]here is no known instance of this procedure having been followed in the present Court." S. ROSENNE, *supra* note 35, at 136. This unused flexibility may go unnoticed by most practitioners or commentators.

The most significant impediment to the ability of the Court to function decisively in evidentiary questions is, of course, that it possesses no power to order production. It cannot subpoena witnesses or experts; it cannot punish for contempt; it has no extraterritorial power to compel the production or disclosure of documentary evidence or the taking of live testimony.⁴¹ Yet, in the past few years, the Court has been increasingly exposed to situations involving disputed facts, by a series of cases—represented principally by the maritime delimitation cases of the early 1980s and, most recently, *Nicaragua v. United States*—that have confronted it with the need to deal with wide-ranging factual questions⁴² so as to reach a decision.⁴³

The Court is authorized to lay down its own rules of procedure, which it has done with a series of overall improving revisions (the most recent of which occurred in 1978).⁴⁴ Continuous strong control of the Court over the proceedings is made possible by the Statute and is implemented by the Rules.⁴⁵ The Court has great flexibility in determining how to handle questions of fact and evidence.⁴⁶ Article 43, paragraph 5 of the Statute specifies

⁴¹ One authority has written:

The Court has no processes to compel the production of evidence. It may request of public international organizations information relative to cases before it, and may call upon the agents to produce any document or supply any explanation. Relevant questions may be put to witnesses and experts. But the Court must depend upon the consent of States to produce witnesses or permit the making of inquiries on the spot.

Alford, *Fact Finding by the World Court*, 4 VILL. L. REV. 37, 53 (1958). His conclusion in this context is that "lacking the necessary power to compel the production of the evidence it may need, the Court tends to rely heavily upon the evidence submitted without positive efforts to police the truth of the facts." *Id.*

⁴² As will be seen below, whether or not the Court "resolves" those issues of fact in terms of basing its decision on any factual determination, it must nevertheless deal with them, one way or another.

⁴³ *Tunisia/Libya*, 1982 ICJ REP. 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 ICJ REP. 246 (Judgment of Oct. 12) [hereinafter cited as *Gulf of Maine*]; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 ICJ REP. 13 (Judgment of June 3) [hereinafter cited as *Libya/Malta*]; and *Nicaragua Merits*, 1986 ICJ REP. 14.

⁴⁴ Article 30, paragraph 1 of the Statute states: "The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure." The 1978 Rules, *supra* note 35, are a continuation of the general improvements made since the first Rules of Court were adopted in 1922. See M. HUDSON, *supra* note 21, §255, at 271.

⁴⁵ Consistent with the powers conveyed upon the Court under Article 30, paragraph 1 of the Statute, recapitulated in Article 58 of the Rules, which provides: "1. The Court shall determine whether the parties should present their arguments before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given." This provision became of critical substantive importance in the second phase of the *South West Africa Cases*, as it was then that the President on behalf of the Court ruled that the parties should present their legal arguments separately from their "factual" arguments, which bifurcated the case in a fundamentally significant manner. See Minutes of Meeting of 12 March 1965, File No. 35765, *Dossier E XXXIII/2/10/1*: "The President: ' . . . A view expressed [by the Court] was that there are in the pleadings substantive and separate questions of law, as distinct from pure questions of fact or mixed questions of fact and law, which might with convenience be argued by counsel separately from the facts.' "

⁴⁶ Article 58 of the Rules also provides:

2. The order in which the parties will be heard, the method of handling the evidence and of examining any witnesses and experts, and the number of counsel and advocates to

that witnesses and experts may be heard by the Court.⁴⁷ Article 44 of the Statute also contemplates instances where "steps are to be taken to procure evidence on the spot."⁴⁸ Paragraph 2 of that article thus contains the necessary implication that the Court is empowered to engage in a *descente sur les lieux*, which indeed it did do once before the Second World War,⁴⁹ and which it considered (but did not do) in one case following the war.⁵⁰ Article 50 of the Statute enables the Court to seek its own expert advice.⁵¹ This has come to be most useful in a variety of cases.⁵² In addition, the Court and the judges may put questions to the agents, counsel and advocates—as well as to the witnesses and experts—in the oral proceedings.⁵³

Moreover, the Rules provide that "[t]he Court may at any time call upon

be heard on behalf of each party, shall be settled by the Court after the views of the parties have been ascertained

See S. ROSENNE, *supra* note 35, at 127–28, who, noting that the words "the method of handling the evidence and of examining any witnesses and experts" were added in 1972, states: "In the four contentious cases before the present Court in which witnesses and witness-experts called by a party have been heard, a procedure suited to the circumstances of each case was adopted. The current wording consolidates that practice and flexibility." *Id.* at 128.

⁴⁷ Cf. Rules, *supra* note 35, Art. 62, para. 2 and Art. 68; and see commentary thereon, S. ROSENNE, *supra* note 35, at 135, 141.

⁴⁸ Article 44, paragraph 1 states: "For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the State upon whose territory the notice has to be served."

⁴⁹ Diversion of Water from the River Meuse, 1937 PCIJ, ser. A/B, No. 70, 4 M. HUDSON, WORLD COURT REPORTS 178, 182 (1943) [hereinafter cited as HUDSON REPORTS]. See D. SANDIFER, *supra* note 25, at 345; Hudson, *Visits by International Tribunals to Places Concerned in Proceedings*, 31 AJIL 696, 697 (1937); M. HUDSON, *supra* note 21, at 566–67.

⁵⁰ In the *South West Africa Cases*; see discussion in D. SANDIFER, *supra* note 25, at 345–48. This implication was confirmed by the Court in a new provision of the revised Rules of 1978, which specifies:

The Court may at any time decide, either *proprio motu* or at the request of a party, to exercise its functions with regard to the obtaining of evidence at a place or locality to which the case relates, subject to such conditions as the Court may decide upon after ascertaining the views of the parties. The necessary arrangements shall be made in accordance with Article 44 of the Statute.

Rules, *supra* note 35, Art. 66; see S. ROSENNE, *supra* note 35, at 139.

⁵¹ Article 50 provides: "The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion." See also Nicaragua Merits, 1986 ICJ REP. at 40, para. 61, and Judge Schwebel's dissenting opinion, *id.* at 321–22, para. 132.

⁵² See Chorzów Factory case (Ger. v. Pol.) (Claim for Indemnity), 1928 PCIJ, ser. A, No. 17 (Judgment No. 13 of Sept. 13); (Expert Enquiry), *id.* (Order of Sept. 13); see further Corfu Channel, 1949 ICJ REP. 4; and Gulf of Maine, 1984 ICJ REP. 246.

⁵³ Under Article 51 of the Statute, "During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30"; and Article 65 of the 1978 Rules, *supra* note 35, provides: "Witnesses and experts shall be examined by the agents, counsel or advocates of the parties under the control of the President. Questions may be put to them by the President and by the judges." Rosenne comments that "the right to put questions to witnesses and experts is granted to the President and to each judge without restrictions corresponding to those found in Article 61 regarding the putting of questions to the parties." S. ROSENNE, *supra* note 35, at 138.

the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose."⁵⁴ Article 67 of the Rules reaffirms and specifies the procedures to be followed in relation to the obtaining of "an enquiry or expert opinion" by the Court in accordance with the provisions of Article 50 of the Statute.⁵⁵ The Court may also request and receive relevant information from public international organizations.⁵⁶ Other provisions of the Rules are concerned with documentary evidentiary production⁵⁷ and notification of such evidence, and of witnesses and experts, to the Court and the opposing party.⁵⁸

⁵⁴ Rules, *supra* note 35, Art. 62, para. 1. This provides for a relatively high degree of autonomy for the Court's processes, in a manner analogous to the power of the Court under Article 61, paragraph 1 to "indicate [at any time prior to or during the hearing] any points or issues to which it would like the parties specially to address themselves, or on which it considers that there has been sufficient argument." See S. ROSENNE, *supra* note 35, at 133. Rosenne's comment on the reworded language of Article 62, paragraph 1, however, suggests that it "seems to open the way to the Court to make its own enquiries on a given matter. There are signs that the Court may take 'judicial notice' of proceedings in competent United Nations organs and perhaps of other statements that are in the public domain." *Id.* at 135. Cf. the treatment accorded to public news reports that remained uncontroverted by respondent government in United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3, 10, para. 13 (Judgment of May 24); and the more extensive treatment in Nicaragua Merits, 1986 ICJ REP. at 40-41, 53, 65-66 and 80, paras. 63, 92, 117 and 146.

⁵⁵ See S. ROSENNE, *supra* note 35, at 140.

⁵⁶ The final substantive specification of powers of the Court to obtain information and evidence is contained in Article 69 of the Rules, which implements Article 34, paragraphs 2 and 3 of the 1945 Statute. Paragraph 2 of Article 34 is more relevant to the present discussion: "The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative." See S. ROSENNE, *supra* note 35, at 142-44 *see also id.* at 261-62. This provision therefore goes beyond mere advice or participation in relation to advisory proceedings.

⁵⁷ Article 50 requires that "copies of any relevant documents adduced in support of the contentions contained in the pleading" (or extracts, as required) be "annexed to the original of every pleading." See S. ROSENNE, *supra* note 35, at 114 n.1:

The Court has sometimes asked to see the original text of a document. In *Corfu Channel* (merits) the Court asked the applicant to produce certain documents, but on its refusal to do so on grounds of State secrecy refused to draw from that refusal to produce any conclusions differing from those to which the actual events gave rise. ICJ Reports, 1949, 4 at p. 32. See also *Ambatielos* case, Pleadings, p. 547. In *Arbitral Award* a contention was withdrawn after the accuracy of a text of a diplomatic paper was successfully challenged. Pleadings, vol. 2, p. 164.

⁵⁸ Rules, Article 56 (paragraph 1) limits the ability of parties to introduce documentary evidence after the close of the written proceedings without the consent of the other party, or (paragraph 2) failing such consent, with the Court's authorization; and contains other related provisions. See S. ROSENNE, *supra* note 35, at 124-25. Article 57 of the Rules requires submission of information "regarding any evidence which [each party] intends to produce or which it intends to request the Court to obtain" (emphasis added). Article 57 also requires "a list of surnames, first names, nationalities, descriptions and places of residence of the witnesses and experts whom the party intends to call, with indication in general terms of the point or points to which their evidence will be directed." Rosenne, *supra*, at 126, points out that the first application of this rule in its new form was in *Tunisia/Libya*, 1982 ICJ REP. 18.

The general practice of the Court has been to admit contested documents and testimony, subject to the reservation that the Court will itself be the judge of the weight to be accorded to it. In many cases parties have produced evidence—particularly in the form of maps or charts in the course of oral proceedings—that has been objected to as untimely submitted; the party producing the material either withdrew it or abandoned it or, more usually, insisted that it was only an “element of pleading” and should be allowed “for illustrative purposes only” and not in effect as an element of proof upon which the Court was intended to rely.⁵⁹

WHAT HAS THE COURT DONE?

IN GENERAL

Sir Hersch Lauterpacht wrote almost 30 years ago, in a discussion of the *Customs Union*⁶⁰ case:

It may not be easy to answer the question whether the circumstance that in a particular case the reasoning of the Court must consist largely of an assessment of facts or probabilities relevant to the situation affects the obligation to make the decision rest on the broadest possible basis of all requisite detail. A substantial part of the task of judicial tribunals consists in the examination and the weighing of the relevance of facts for the purpose of determining liability and assessing damages. As the *Corfu Channel* case showed, the Court is in the position to perform that task with exacting care.⁶¹

Although there has been a variety of instances where the fact-finding facilities of the Court have not been as successful,⁶² it has also been said that “[a]s an occasional court, one to which the cases of secondary importance will be referred for settlement, the World Court has fact-finding facilities as good as it needs.”⁶³

How good is “as good as it needs”? This must be answered in the overall context of the relatively low volume of judicial work of the Court, its composition of a large number of judges who tend to be scholars and international lawyers rather than trial lawyers and courtroom practitioners, and the fact that it is both a court of first instance and a court of last resort. In discussions

⁵⁹ Cf. the use by the Belgian agent in the *Meuse* case of a map, a bas-relief and models of canal locks as “part of the agent’s pleadings.” M. HUDSON, *supra* note 21, §516, at 566.

⁶⁰ Customs Régime between Germany and Austria, 1931 PCIJ, ser. A/B, No. 41.

⁶¹ H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 48 (1958).

⁶²

In the *Peter Pazmany University Case* [1933 PCIJ, ser. A/B, No. 61] the Court did not have most of the documents of the written proceedings of the arbitral tribunal which made the decision being reviewed. In the *Lotus Case* [1927 PCIJ, ser. A, No. 10] the Court did not have the Turkish judicial decision that gave rise to the dispute. In the case of *Minority Schools in Albania* [1935 PCIJ, ser. A/B, No. 64] the decision was rendered based upon many assumptions concerning the Albanian education situation. But if the Court can be developed into a more vital force as part of the United Nations structure, which is a major assumption, attention to its fact-finding resources should receive a high priority.

Alford, *supra* note 41, at 91.

⁶³ *Id.*

of this subject, sometimes the assumption is silently made that the Court ought somehow to enjoy coercive and prescriptive powers on the same level, e.g., as those of a U.S. district court. Despite its being a court of first instance, in many ways proceedings before the Court take on the characteristics of an enormous, complex and lengthy appellate argument.

Nevertheless, the Court's appreciation of important questions of proof and testimony is quite lively, although naturally not comparable to the involvement of a single common-law trial judge sitting with a jury. In many aspects—in particular, as regards determining questions of fact—the judges of the Court must necessarily serve as their own “jury” (save to the extent that the Court may appoint assessors or experts).⁶⁴ This circumstance, however, is congruent with the nature of the subject matter of international law: not only does the Court deal with states and not individuals—and is thus not normally required to determine subjective and difficult issues such as *scienter* and *mens rea*,⁶⁵ it also deals with a sophisticated and relatively narrow series of rules and problems marked by a relatively high level of abstraction.

Without departing from the world of the common law, however, cases of great factual complexity are frequently determined by English courts acting on the equity side on the basis of documentary proof embodied solely in affidavits that are read aloud into the record, together with the legal precedents. An analogy to civil proceedings fought on affidavits is not inapt, and lends appropriate perspective to the nature of practice before the Court. Points of fact are asserted and supported by the parties in their written pleadings and in documentary proofs annexed to the written pleadings. They are then argued and elaborated and sometimes dropped and defeated, without more, by counsel in the course of oral argument. Necessary inferences are drawn about the abandonment of certain arguments when the factual assertions upon which they were based are neglected. Most frequently, there

⁶⁴ On the use of assessors, which has never been invoked, see note 35 *supra*. Article 50 of the Statute limits the role of Court-appointed experts to “carrying out an enquiry or giving an expert opinion.” Since the Court is not bound to accept any conclusions offered to it by assessors or experts, the Court itself retains the prime responsibility for factual determinations; it thus appears to be a court and a jury panel in one. The proper analogy is therefore to a panel of trial judges sitting (without a jury) on a case of mixed law and fact, who are required to make findings of fact as well as law to support their decision.

⁶⁵ The issue of *mens rea* or intent became a hot one, however, during the debates in the *South West Africa Cases* leading to the problematic amendment of applicants' submissions to eliminate the assertion of “deliberate oppression” of the inhabitants of South West Africa. South Africa took the position that as long as such an allegation remained part of the applicants' case, South Africa must be entitled to prove (by lengthy and detailed evidence of its officials and representatives) that its intent or motives were not to oppress the inhabitants. Applicants, in response, took the position that *mens rea* or intent is presumed in the case of governmental actions in the sense that governments must be presumed to “intend” the natural results of actions they have undertaken. Contrast the disposition of this issue by the Court a few years later, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ REP. 16, 57, para. 129 (Advisory Opinion of June 21): “the question of intent or governmental discretion is not relevant; nor is it necessary to investigate or determine the effects of [apartheid] . . . upon the welfare of the inhabitants.”

is no need to seek an actual test of proofs—other than weighing assertion and counter-assertion—in the course of the written and oral arguments.

The basic rule of thumb is that the Court is always free to draw its own conclusions: sometimes ignoring factual assertions completely; sometimes finding that a point is made or established by default; sometimes seeking new evidence; sometimes accepting and sometimes excluding evidence from consideration. It is erroneous to view the Court's procedure as requiring that a *prima facie* case be made out in each instance by the presentation of testimony, as in a municipal criminal or civil proceeding.

WHEN EVIDENCE IS PRODUCED

Documentary Evidence

The great majority of issues of fact presented to the Court since 1922 has been capable of resolution principally by pleading and documentary proof.⁶⁶ The specific formulation of the Statute and Rules contemplated that documentary evidence would be the main source.⁶⁷ Indeed, the International Court may have naturally inherited much from civil law procedure, which, as Sandifer writes, "is characterized by the priority role it accords to written evidence."⁶⁸

From the beginning, the Court tended to find facts as established or as implied by the documentary evidentiary record and the course of pleadings, without more. An early notable example occurred in *German Interests in Polish Upper Silesia*. One of the issues in the case concerned the purpose for which certain large agricultural estates had been acquired.⁶⁹ The Court drew

⁶⁶ This means that the parties to disputes before the Court present and state facts in their "Cases" and "Counter-Cases," or "Memorials" and "Counter-Memorials," prepared and submitted in the absence of any stringent formal rules or limitations on form and length. See the original formulation in Rules, Arts. 39 and 40, reprinted in 1 HUDSON REPORTS, *supra* note 49, at 70 (1934).

⁶⁷ Thus did Judge Anzilotti refer to witnesses and experts as "living documents." 1 HUDSON REPORTS, *supra* note 49, at 287.

⁶⁸ D. SANDIFER, *supra* note 25, at 198. However, rather than arguing for a direct relationship between the prevalence of documentary evidence in international tribunals and the attitudes of civil procedural law, Sandifer suggests that

[t]he emphasis on written evidence in international procedure seems to have been influenced to a great extent by the nature of the problems involved. The distances involved in the transactions forming the subject matter of many international proceedings have also made necessary the use of written evidence. In arbitrations between States in their own right the evidence of the contested questions has frequently been a matter of public record.

Id. at 200.

⁶⁹ In a nutshell: if they related to industrial or mining operations, they did not fall within the category of being merely large rural estates but fell under different provisions of the applicable Geneva Convention. The question of subsidence of superjacent land over mining operations was therefore considered in great detail, as was the suitability of woodland for producing pit props for mining excavations (as well as fodder for pit ponies).

inferences from the documents about the owners' need to acquire surface (rural) land to avoid liabilities for mining subsidence.⁷⁰

The scope and quantity of documentary evidence has grown dramatically since the first days of the Permanent Court. In the first case before it,⁷¹ the documentary list contained only one letter, two memoranda and one telegram.⁷² By 1927, in the Advisory Opinion on the *European Commission of the Danube*, the total documentary and evidentiary production amounted to more than 266 items, some of which were of considerable length.⁷³ By the time the *Polish Upper Silesia* litigation commenced in 1925, therefore, the Court had become fully accustomed to having substantial amounts of evidentiary facts presented during written and oral pleadings and in annexures thereto; more than 201 documentary annexes were submitted in connection with various phases of those proceedings, consisting of contracts, opinions, notarial records, bylaws, letters, maps, plans, memoranda, notes, decrees,

⁷⁰

Furthermore, a document [a letter] filed by the Agent of the Applicant . . . , which document has not been disputed, decisively establishes the fact that the purpose served by the estate is as the Court understands it. . . . It appears therefore that the object of the purchase of the Mokre estate was to avoid a speculation which would injure the interests of the concern.

Certain German Interests in Polish Upper Silesia (Ger. v. Pol.) (Merits), 1926 PCIJ, ser. A, No. 7, at 61 (Judgment of May 25).

It should moreover be noted that the Applicant has stated that the timbered portion is utilized for the needs of the mine (pit props) and that this statement has not been disputed by the Respondent. The Court therefore regards it as proved, for the purposes of the suit, that the Baranowice estate fulfils the conditions of Article 9 . . . owing to the exploitation of the timber.

Id. at 63. The Judgment continued as follows: "The same conclusion is indicated as regards the untimbered portion, because this land, which is devoted to agriculture, supplies foodstuffs for the workers and hay, straw, etc. for the pit ponies." *Id.*

⁷¹ Nomination of the Netherlands Workers' Delegate to the Third Session of the International Labour Conference, 1922 PCIJ, ser. B, No. 1 (Advisory Opinion of July 31).

⁷² *Id.* at 11-13 (*see* ser. C, No. 1, at 345-459); 1 HUDSON REPORTS, *supra* note 49, at 116. In the second advisory proceeding brought before the Court, Competence of the International Labour Organisation with Respect to Agricultural Labor, 1922 PCIJ, ser. B, No. 2 (Advisory Opinion of Aug. 12), the documentary dossier included six letters, two notes and one telegram. *Id.* at 11-13; 1 HUDSON REPORTS, *supra*, at 124-25. In the third case, Competence of the International Labour Organisation with Respect to Agricultural Production, the documentary dossier included five letters and one extract from minutes. 1922 PCIJ, ser. B, Nos. 2 and 3, at 51; 1 HUDSON REPORTS, *supra*, at 138-39. By the next year, in Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8, 1921, 1923 PCIJ, ser. B, No. 4 (Advisory Opinion of Feb. 7), the dossier was expressed in terms of being "supplementary documents" and "two series of documents." *Id.* at 10; 1 HUDSON REPORTS, *supra*, at 147.

⁷³ *European Commission of the Danube*, 1927 PCIJ, ser. B, No. 14 (Advisory Opinion of Dec. 8). The Court appended an annex consisting of (1) more than 34 documents transmitted by the League Secretariat and, "Transmitted in the Name of the Interested Governments or Filed by their Representatives," 11 international agreements, 8 extracts from protocols and minutes of conferences, 54 items of diplomatic correspondence and 9 maps; (2) 37 Protocols of the Commission submitted by the European Commission of the Danube; and (3) documents prepared by the Registry, including 31 "treaties, acts and regulations," 68 protocols and minutes of conferences and international commissions, and 14 items of diplomatic correspondence.

minutes and similar materials.⁷⁴ In the *Corfu Channel* case of 1949, the documents submitted to the Court included 116 items introduced by the United Kingdom, 66 by Albania and 6 jointly (for a total of 188).⁷⁵ And, by 1950, when the Court handed down its great Advisory Opinion on the *International Status of South-West Africa*, the practice of ever increasing documentary annexures had reached truly epic dimensions. (It took 27 printed pages of the Court's report merely to list the more than three hundred documents contained in 44 folders.)⁷⁶

It became apparent early on that the Court would find it difficult, if not impossible, to assert anything approaching stringent rules relating to the substance of the evidence produced. As was pointed out above, the Court has applied practically no rules of propriety or admissibility to documentary evidence.⁷⁷ The absence of rules restricting the length of documents has long been associated with the perceived "freedom" of sovereign states to present their cases before the Court howsoever they see fit, provided they comply with minimum standards of judicial procedure such as adherence to time limits, cutoff of evidence presented following a certain date, and ability to alter or amend submissions at a late stage in the proceedings without adverse consequences, as well as the general principle alluded to as "equality of arms."

The basic approach has been for the Court to make relatively ad hoc determinations as to admissibility, suitability and probative value on the basis of the facts and circumstances of each case and within the context and broad compass of its Statute and Rules. As Rosenne has aptly put it: "the probative value of the evidence depends upon the question at issue, and is determined by the substantive rules of international law through the application of which the Court will reach its decision."⁷⁸ This problem is not as circular as it may sound; indeed, Rosenne characterizes it as "a reasonable interpretation of the criterion of relevance."⁷⁹

⁷⁴ See Annex III (Documents Submitted by the Parties During Proceedings), 1926 PCIJ, ser. A, No. 7, at 98-107, reproduced in 1 HUDSON REPORTS, *supra* note 49, at 580-87.

⁷⁵ *Corfu Channel*, Merits, 1949 ICJ REP. at 132-41 (listed in Annex I).

⁷⁶ See *International Status of South-West Africa*, 1950 ICJ REP. 128, 193-219 (Advisory Opinion of July 11).

⁷⁷ Judge Hudson observed, in connection with an early and significant decision of the Permanent Court, that "[i]n general, the Court has refrained from requiring specific types of proof for particular matters; thus in the *German Interests in Upper Silesia Case* it rejected a contention that the acquisition of Czechoslovak nationality could be established only by a certificate from the Czechoslovak Government." M. HUDSON, *supra* note 21, at 565 (citing 1926 PCIJ, ser. A, No. 7, at 73).

⁷⁸ 2 S. ROSENNE, *supra* note 30, at 582.

⁷⁹ *Id.* He continues:

In its attitude towards documentary evidence, the Court is strict. For example the Court found "cogent evidence" of what the parties intended from the actual texts of the instruments of ratification of the relevant treaty in the *Ambatielos* case (jurisdiction). 1952, at p. 42. It found confirmation of the Persian Government's intentions in the text of a law submitted to the Majlis in 1933 It found in the "invariable" construction of a Norwegian decree of 1812, in later Norwegian decrees, as well as in other legal documents, evidence of the interpretation placed by Norway on the decree of 1812, which itself was admitted to be not clear. 1951, p. 134. . . . In the *Nottebohm* case (second phase) the

As an important aspect of documentary evidence, maps have in general played a key role in litigation before the Court. Many issues framed for its determination have been related to territorial disputes and boundary claims; for example, the *Jaworzina* case, the *Monastery of Saint-Naoum*, the *Eastern Greenland* case, *Frontier Land*, *Minquiers and Ecrehos* and the *Temple of Preah Vihear*.⁸⁰ This last case was particularly significant for its handling of cartographic evidence; in addition to much documentary proof of a historical nature, it involved the submission of old maps and surveys as "real" evidence of the contemporaneous intentions of the parties and their predecessor governments concerning such issues as the location of the land boundary and the location (and shifting) of the watershed.⁸¹

In some instances maps have also been intended to constitute evidence of particular types of facts. Here, more than ever, the technical and scientific maps and charts produced during the maritime delimitation cases of the early 1980s played a peculiar role; they were used primarily at a higher level of abstraction to persuade the Court that certain elements of the "relevant circumstances" should be accorded a particular treatment.⁸² In all three of the cases, much attention was given to maps, but principally not as evidence

"essential facts appear with sufficient clarity from the record", i.e. the documents in support of the written pleadings, and further documents filed subsequently. 1955, at p. 24. This is an interesting example, because from the record the Court established the purpose for which naturalization was asked for, i.e. Mr. Nottebohm's intentions in the year 1939, that gentleman himself not supplying any direct evidence, in writing or orally, to the Court.

Id. at 581-82.

⁸⁰ Delimitation of the Czechoslovak-Polish Frontier (Question of Jaworzina), 1923 PCIJ, ser. B, No. 8 (Advisory Opinion of Dec. 6); Monastery of Saint-Naoum (Albanian Frontier), 1924 PCIJ, ser. B, No. 9 (Advisory Opinion of Sept. 4); Legal Status of Eastern Greenland (Den. v. Nor.), 1933 PCIJ, ser. A/B, No. 53 (Judgment of Apr. 5); Sovereignty over Certain Frontier Land (Belg./Neth.), 1959 ICJ REP. 209 (Judgment of June 20) [hereinafter cited as *Frontier Land*]; Minquiers and Ecrehos (Fr./UK), 1953 ICJ REP. 47 (Judgment of Nov. 17); and Temple of Preah Vihear (Cambodia v. Thailand) (Preliminary Objections), 1961 ICJ REP. 17 (Judgment of May 26); (Merits), 1962 ICJ REP. 6 (Judgment of June 15).

⁸¹ One commentator has observed that "official maps have played a major part in support or as proof of the exercise of sovereignty over a disputed area or as evidence of a litigant's state of mind," adding that "maps may be regarded as strong evidence of what they purport to portray. They may be termed and treated as admissions, considered as binding, and said to possess a force of their own." Weissberg, *Maps as Evidence in International Boundary Disputes: A Reappraisal*, 57 AJIL 781, 803 (1963). For examples taken from the Court's practice, see *id.*

⁸² Thus, for example, in *Tunisia/Libya*, Tunisia produced impressionistic maps on a very large scale, including bathymetric contours on a scale of 10 meters (which created the impression that a relatively flat area of the ocean floor was made up of precipices and crevasses), and Libya produced computerized models and block diagrams of the same area to precisely the contrary effect: i.e., to show the relative absence of significant geomorphological features. In *Gulf of Maine*, the myriad of maps and charts included the most detailed and recondite illustrations of the feeding and schooling habits of various species of fish. In *Libya/Malta*, the Court was confronted by sea-surface cartography by the party claiming equidistance (Malta) and by geomorphological charts, diagrams and models intended to demonstrate the existence of a fundamental discontinuity on the sea bottom by the party urging attention to geological and geomorphological natural prolongation (Libya). (The writer served as counsel to Libya in this case.)

of understandings.⁸³ As everyone knows, much can be accomplished by maps and diagrams to frame an argument. Like statistics, cartography can "lie." There was thus considerable debate in these cases not so much about the accuracy of the maps introduced, but rather about their correctness (in the context that they were designed to illustrate, e.g., ridges on the seabed or ocean currents). A natural degree of enhancement or exaggeration was necessary even to perceive any difference between one sector and another.

Maps in these later cases, then, came to be indicative of legal conclusions, and demonstrative of their soundness, in quite a new way. They were almost wholly ignored, however, by the Court and the Chamber.⁸⁴

Finally, maps have been offered as "real evidence" where they were intended to demonstrate an act of a state such as agreement to a given boundary or state of affairs. They can also show an omission of a state such as acquiescence in an indicated boundary through failure to register sufficient protest against it.⁸⁵

In other cases, the documentary evidence produced has required a sophisticated perspective and a fine historical touch to review, evaluate, sort and determine: in *Legal Status of Eastern Greenland*,⁸⁶ the Court was obliged in 1933 to review materials reaching back to the 12th century. This historical role was later to be repeated in the *Anglo-Norwegian Fisheries* case, recounting 17th-century practices;⁸⁷ the *Minquiers and Ecrehos* case,⁸⁸ which looked back to the 13th century; and the *Temple* case,⁸⁹ where the work of a 1904 boundary commission was carefully studied. Nineteenth- and 20th-century diplomatic and other historical materials of great detail and difficulty were reviewed in the course of the pleadings in *U.S. Nationals in Morocco*.⁹⁰ Doc-

⁸³ Although in the southern sector of the delimitation in *Tunisia/Libya*, this principle was advanced regarding the extent of the early Italian administration of Libya and the history of sponge-fisheries regulation by the Bey of Tunis—but as demonstrative aids.

⁸⁴ See Weissberg, *supra* note 81, for a useful review of the use of maps in the International Court prior to these three cases.

⁸⁵ Thus, in *Tunisia/Libya* the decisively important fact for the first segment of the delimitation was the carefully conditioned mutual acceptance that the Court found of a status quo along the 26° line where the eastern edge of the Tunisian offshore petroleum concessions abutted the western edge of the Libyan concessions. 1982 ICJ REP. at 83–84, paras. 117–18. Note also that Tunisia subsequently sought unsuccessfully to revise the delimitation by asserting that the de facto line had not correctly represented a joint abutting of concession lines and that no such congruence (and hence no such understanding) had existed. See Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (*Tunisia v. Libya*), 1985 ICJ REP. 192 (Judgment of Dec. 10).

⁸⁶ 1933 PCIJ, ser. A/B, No. 53.

⁸⁷ Fisheries case (UK v. Nor.), 1951 ICJ REP. 116 (Judgment of Dec. 18). The historical facts laid before the Court were treated *id.* at 124–25; geographical facts at 127–28 and 140–43; sociology at 128; fisheries themselves at 127–28; economics at 133; and history in general at 133–38.

⁸⁸ 1953 ICJ REP. 47.

⁸⁹ 1961 ICJ REP. 17; 1962 ICJ REP. 6.

⁹⁰ Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 ICJ REP. 176 (Judgment of Aug. 27).

uments of substantial complexity were introduced, in addition, in the second phase of the extended *Barcelona Traction* litigation, requiring the Court to appreciate a variety of laws, regulations and corporate resolutions, as well as company law and creditors' rights in general under the laws of at least two municipal jurisdictions.⁹¹

However, the Court must be careful in handling documentary evidence since such evidence, by its very nature, is somewhat unilateral and passive. In the merits phase of the *Nicaragua* case, the Court observed:

A large number of documents have been supplied in the form of reports in press articles, and some also in the form of extracts from books. Whether these were produced by the applicant State, or by the absent Party before it ceased to appear in the proceedings, the Court has been careful to treat them with great caution; even if they seem to meet high standards of objectivity, the Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to *corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence.*⁹²

This problem was highlighted, of course, by the fact that respondent had withdrawn from active participation in the proceedings.

Witnesses and Experts

There have only been eight cases in 60 years in which live witnesses and experts of the parties have appeared before the Court. Rosenne characterized the matter (as of 4 years ago) as follows:

The expression "the method of handling the evidence and of examining any witnesses and experts" was added in 1972. In the four contentious cases⁹³ before the present Court in which witnesses and witness-experts called by a party have been heard, a procedure suited to the circumstances of each case was adopted. The current wording consolidates that practice and flexibility.⁹⁴

Witnesses and experts were heard by the Court for the first time in *German Interests in Upper Silesia*.⁹⁵ They gave evidence live in Court on the relationship between large landed estates and the subjacent mines (a question that involved highly technical material relating to, e.g., flooding and subsidence). Germany called four "expert-witnesses" and Poland called one; they testified

⁹¹ *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)* (New Application), 1970 ICJ REP. 3 (Judgment of Feb. 5). "In the course of the proceedings, the Parties have submitted a great amount of documentary and other evidence intended to substantiate their respective submissions. Of this evidence the Court has taken cognizance." *Id.* at 50-51, para. 102. See generally *id.* at 33-50.

⁹² *Nicaragua Merits*, 1986 ICJ REP. at 40, para. 62 (emphasis added).

⁹³ This comment was accurate as of the date of its publication (1983), although (as discussed below) it has now been superseded by evidentiary developments in the *Libya/Malta*, *Gulf of Maine* and *Nicaragua (Merits)* cases.

⁹⁴ S. ROSENNE, *supra* note 35, at 127-28.

⁹⁵ *Certain German Interests in Polish Upper Silesia (Ger. v. Pol.)* (Jurisdiction), 1925 PCIJ, ser. A, No. 6 (Judgment of Aug. 25); (Merits), 1926 PCIJ, ser. A, No. 7 (Judgment of May 25).

over a period of 3 days and were questioned by the agents and also by some of the judges.⁹⁶ The agents were also given opportunities later to comment on the testimony.⁹⁷ The Court in its decision on the merits made numerous determinations of a highly technical nature based upon the documentary and expert evidence that had been presented.⁹⁸

In the *Chorzów Factory* case (in the later phase of the *Silesia* litigations), the Court ordered an expert inquiry so as to determine the compensation owing for the damages suffered.⁹⁹ This determination involved sophisticated financial analysis of the value of the factory at the date of its expropriation, and what the "financial results" and the present value would have been if it had not been expropriated.¹⁰⁰ Production of the testimony of witnesses or experts was contemplated in one other proceeding before the Permanent Court, but was aborted by the failure to call the witness in question.¹⁰¹

⁹⁶ One witness was not present in court in order to approve the record and "subsequently the testimony of this witness was set aside." M. HUDSON, *supra* note 21, at 570 (referring to 1926 PCIJ, ser. E, No. 3, at 211).

⁹⁷ 1926 PCIJ, ser. C, No. 11, vol. 1 at 25-34; see M. HUDSON, *supra* note 21, §518, at 570. The right to comment on the testimony is preserved under Article 48 of the present Rules; it can be a highly important component of a party's case. (As a prime example of this: applicants' extensive and detailed comments on the massive South African evidence would probably have been highly important in the *South West Africa Cases (Second Phase)*, had the Court ever reached the merits.)

⁹⁸ For example, the Court recognized that the testimony of the expert witnesses concerning the relationship of the estates at the surface of the land to the subterranean mine workings supported "the justice of the objections taken by the Applicant" and established the purposes for which surface land had been purchased by the "mining undertaking." 1926 PCIJ, ser. A, No. 7, at 54-55. See further the documentary evidence of a letter, *id.* at 61. In addition, Poland had contended "that ownership of the surface is not now absolutely necessary [to avoid subsidence] . . . because modern technical knowledge has introduced processes which enable any damage to the surface to be avoided." *Id.* at 51. The Court heard technical evidence addressed to this question and made a series of findings, both technical and general. *Id.* at 52-53.

⁹⁹ In the earlier stages of these German-Polish litigations of the 1920s, the Court had specifically invited "the Parties to furnish, at a public hearing, by whatever means they may think fit, further information regarding the points reserved by the Court for this purpose." Order of Court of Mar. 22, 1926 PCIJ, ser. A, No. 7, at 96-97.

¹⁰⁰ See *Chorzów Factory*, Order of Sept. 13, 1928 PCIJ, ser. A, No. 17, at 99-103. In support of its unsuccessful application for interim measures of protection in 1927, the German Government had introduced "the expert opinion of the American firm Lybrand, Ross Bros. and Montgomery . . . [which had] carefully examined the books of the Bayerische and arrive[d] at a conclusion of 65 million Reichsmarks." Request for Interim Protection by the German Government, 1927 PCIJ, ser. A, No. 12, at 7. This inquiry was discussed in the body of the Court's main opinion as being intended to "obtain further enlightenment in the matter" of the damage and indemnity. Indemnity, 1928 PCIJ, ser. A, No. 17, at 4, 51-57. The Court appointed chemical engineers (two Norwegian and one Swiss) as its experts for this purpose, 1928 PCIJ, ser. C, No. 16-II, at 12-13 (Order by the President of Oct. 16); and it accepted the nomination of assessors by the parties, *id.* at 13-14 (Order by the President of Nov. 14). However, a month later the case was settled, the German application was withdrawn and the expert inquiry was therefore terminated, 1928 PCIJ, ser. A, Nos. 18/19, at 14-15 (Order by the President of Dec. 15), together with the proceedings, 1929 PCIJ, ser. A, Nos. 18/19, at 11-13 (Order of May 25).

¹⁰¹ See Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer, 1926 PCIJ, ser. B, No. 13 (Advisory Opinion of July 23); and

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In addition, there were two instances before the Permanent Court when the Court rejected (or declined to undertake) an expert inquiry or investigation. In the first,¹⁰² the Court reasoned that an inquiry into factual questions was not called for since its decision was to be limited to legal questions; and in the second, it found no basis for conducting an inquiry into whether a de facto monopoly in Congo River traffic had been established because there would be no cause of action unless measures prohibiting competition were also found to exist.¹⁰³

Whereas the *Silesia* cases were the only real example of testimonial evidence before the Permanent Court, the *Corfu Channel* case in 1949 and the *Nicaragua* case in 1986 are the outstanding examples of the use of witnesses and experts to arrive at a decision in the International Court. In *Preah Vihear* the expert testimony was in essence superfluous to the decision of the Court, which was reached on separate legal grounds; likewise, in *South West Africa*, the 14 "witness-experts" produced by South Africa during more than 2 months might as well never have come to The Hague, since the decision of the Court rendered any inquiry into the facts supererogatory. The massive technical evidence presented in the three latest maritime delimitation cases¹⁰⁴ either neutralized itself because of its complexity¹⁰⁵ or lack of distinctness,¹⁰⁶ or was neutralized or rendered irrelevant for purposes of the decision by the supervening continental shelf provisions of the United Nations Convention on the Law of the Sea.¹⁰⁷

ser. E, No. 3, at 213, cited in M. HUDSON, *supra* note 21, §518, at 570 & n.76. Judge Hudson also alludes to the incident in *Monastery of Saint-Naoum* in which a potential witness arrived at The Hague too late to give his evidence and was thus excluded. "[L]ikewise, letters sent by States' representatives were returned to them." *Id.*, §520, at 572.

¹⁰² D. SANDIFER, *supra* note 25, at 334; Free Zones of Upper Savoy and the District of Gex (Fr./Switz.), 1932 PCIJ, ser. A/B, No. 46, at 162 (Judgment of June 7) [hereinafter cited as Free Zones]. Here the Special Agreement actually provided for a request to the Court "by either Party to delegate one or three of its members for the purpose of conducting investigations on the spot and of hearing the evidence of any interested persons." 2 HUDSON REPORTS, *supra* note 49, at 452 (1935).

¹⁰³ Oscar Chinn (Belg./Gr. Brit.), 1934 PCIJ, ser. A/B, No. 63, at 84, 88 (Judgment of Dec. 12); 1934 PCIJ, ser. C, No. 75, at 214-20, 239-40; D. SANDIFER, *supra* note 25, at 334.

¹⁰⁴ In *Tunisia/Libya* Libya called one expert, a geomorphologist, who was cross-examined very briefly by Tunisian counsel. However, the parties had brought "experts" (three for Tunisia and two for Libya) into the role of pleading technical portions of the case in argument, who were thus considered part of each delegation and not independent "experts" within the meaning of the Rules (hence not subject to cross-examination). See 1982 ICJ REP. at 25, paras. 10-11. In *Gulf of Maine* Canada called one expert, who was examined and cross-examined. 1984 ICJ REP. at 9. In *Libya/Malta* three geological experts were called by Libya and two by Malta, and three of them were extensively cross-examined. 1985 ICJ REP. at 17-18, para. 9.

¹⁰⁵ See *Tunisia/Libya*, 1982 ICJ REP. at 57, para. 66.

¹⁰⁶ See *Gulf of Maine*, 1984 ICJ REP. at 273-77, paras. 44-55, especially 45 and 55. The United States had called an expert, *id.* at 256, para. 9, but his testimony was, in essence, disregarded.

¹⁰⁷ See *Libya/Malta*, 1985 ICJ REP. at 35-36, paras. 39 and 40; see also para. 41, at 36-37.

The *Corfu Channel* case was therefore the first important case before the present Court in which both witnesses and experts were used,¹⁰⁸ and in which experts were called by the Court to provide detailed findings.¹⁰⁹ The witnesses for the United Kingdom were naval officers who testified about the damage to the British destroyers *Saumarez* and *Volage* and the nature, age and probable source of the mines that would have done the damage.¹¹⁰ Albania called army and navy officers to testify to the absence of mine-laying activities.¹¹¹ The direct and cross-examination of these witnesses and experts was more extensive and detailed than ever before.¹¹² *Corfu Channel* also produced significant precedent concerning the "best evidence" rule as applied to documentary material,¹¹³ as well as significant rulings concerning the production of new documents,¹¹⁴ the value of hearsay evidence,¹¹⁵ and the use of evidence obtained in violation of accepted customary international law rules by "self-help" or direct intervention (in the context of a mine-sweeping operation conducted shortly after the original incidents, by the British Navy, in Albanian territorial waters without Albania's consent).¹¹⁶

In addition, in *Corfu Channel* the Court requested an expert opinion and

¹⁰⁸ Ten witnesses were called and heard: seven by the United Kingdom and three by Albania. Albania also designated two experts. This took 3 weeks. *Corfu Channel*, 1949 ICJ REP. at 7-8.

¹⁰⁹ See generally D. SANDIFER, *supra* note 25, at 290-91; G. WHITE, *THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS* 130-31 (1965).

¹¹⁰ These were: Cmdr. Sworder, RNVR (witness and expert); former Lt.-Cmdr. Kovacic of the Yugoslav Navy (witness); Capt. Selby, RN (witness); Cmdr. Paul, RN (witness); Lt.-Cmdr. Lankester, RN (witness and expert); Cmdr. Mestre, French Navy (witness); and Cmdr. Whitford, RN (witness and expert). 1949 ICJ REP. at 8. The Court indicated that it had "heard the evidence of the witnesses and experts called by each of the Parties in reply to questions put to them in examination and cross-examination on behalf of the Parties, and by the President on behalf of the Court or by a Member of the Court." *Id.* at 7.

¹¹¹ Albania called Capt. Shtino and First Capt. Polena, Albanian Army, and the former Vice-President of the Executive Committee of Saranda as witnesses, and a Bulgarian Navy Captain and a French Rear Admiral as experts. *Id.* at 8.

¹¹² One commentator has observed: "As a result of the *Corfu Channel Case* the Court appears to have developed rudimentary but sound techniques for hearing testimony by witnesses. The efficiency of examination of witnesses and the care in recording testimony is in marked contrast to the first efforts in *German Interests in Upper Silesia*." Alford, *supra* note 41, at 73-74.

¹¹³ 1949 ICJ REP. at 17; see also D. SANDIFER, *supra* note 25, at 206.

¹¹⁴ 1949 ICJ REP. at 8-9.

¹¹⁵ Concerning the statements attributed to third parties by Lt.-Cmdr. Kovacic, which "can be regarded only as allegations falling short of conclusive evidence. A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here." *Id.* at 17; see also D. SANDIFER, *supra* note 25, at 139-40.

¹¹⁶

This justification . . . was presented first as a new and special application of the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task.

The Court cannot accept such a line of defence.

1949 ICJ REP. at 34-35; see also D. SANDIFER, *supra* note 25, at 114-15, 139-40.

appointed a committee of experts to collect and evaluate complex evidence.¹¹⁷ The Court's questions were answered in painstaking detail.¹¹⁸ The Court in the subsequent phase of *Corfu Channel* obtained the opinion of two new experts¹¹⁹ about the accuracy of the British claims for the loss of the *Saumarez* and the damage to the *Volage*; they arrived at a confirmatory figure quite close to that offered by the United Kingdom in its submissions.¹²⁰

In both the *Temple of Preah Vihear* and the *South West Africa Cases*, a wealth of evidence was laid before the Court that it did not have to resolve. In the *Temple* case, both Cambodia and Thailand presented detailed evidence of a technical nature relating to whether the boundary line as drawn in the early years of the century had been intended to follow (and whether it had succeeded in following) the line of the watershed in a mountainous part of the frontier between the countries. The Court had to consider a variety of technical evidence concerning the location of the watershed referred to in the original map drawn by the Mixed Commission of Delimitation between Indo-China and Siam set up under the Treaty of February 13, 1904; it also had to consider other evidence relating to the nature and purport of that map and other cartographic materials.¹²¹ The Court in its decision clearly relied on the diplomatic and historical record as showing a lack of protest to, and acquiescence by Thailand in, the location of the boundary by the map accompanying the Boundary Treaty, which placed the Temple of Preah Vihear in Cambodia. The Court thus held that since the location indicated in the map had been accepted, it was unnecessary to examine the physical location of the boundary as derived from the terms of the Treaty (i.e., the location of the "watershed" line).¹²² The intricate and technical questions of geog-

¹¹⁷ 1949 ICJ REP. at 9. The experts were three naval officers from Norway, Sweden and Holland. They proceeded immediately to the Corfu Strait and filed their response only 3 weeks after their original appointment. For the Court's questions and the experts' answers, see Ann. 2 to the Judgment, *id.* at 142-51 (Experts' Report of Jan. 8, 1949). This report was supplemented by a second report requested at the public sitting of Jan. 17, 1949; two of the three experts returned to the area of Sibenik in Yugoslavia and Saranda in Albania to answer further questions, which they did in their report filed one month later. *Id.* at 152-62.

¹¹⁸ Commenting on one issue discussed by the experts, the Court stated: "The Court cannot fail to give great weight to the opinion of the Experts which examined the locality in a manner giving every guarantee of correct and impartial information." *Id.* at 21.

¹¹⁹ A Rear Admiral and the Director of Naval Construction of the Royal Netherlands Navy. Assessment of Amount of Compensation, 1949 ICJ REP. 237, 238 (Order of Nov. 19) and 244, 247-50 (Judgment of Dec. 15).

¹²⁰ The Experts' Report of Dec. 1, 1949 was submitted as Annex 2 to the Judgment. 1949 ICJ REP. at 258-60. Upon this report were based questions by Members of the Court, to which the experts replied at a hearing 2 days later. Ann. 3, *id.* at 261-65. (The questions concerned details of valuation, replacement value, value of stores and equipment, scrap value and depreciation.)

¹²¹ The Cambodian Government called a senior civil servant as a witness; the Thai Government called the Dean of the International Training Center for Aerial Survey in Delft and the head of its Geological Section as experts, and an engineer at the same institution as a witness and expert. 1962 ICJ REP. at 9. In addition, the Court viewed in private "a film of the place in dispute filed by Cambodia." *Id.*

¹²² *Id.* at 32-34.

raphy and geomorphology intended to support the description in the Treaty were therefore never resolved by the Court since its legal determination in the case made it unnecessary to reach those facts.¹²³

In the second phase of the *South West Africa Cases*, respondent South Africa presented an extraordinary and unprecedentedly large number of witnesses, almost all of whom were to testify to the "beneficial" effects of apartheid on the inhabitants of South West Africa, which took more than *two months*. However, essentially because the applicants chose to rest their case on the legal principle that apartheid was per se impermissible and that its application to South West Africa was therefore a fortiori a violation of the mandate, it was necessary for South Africa, if it wished to bring these witnesses before the Court, to have them qualified as other than witnesses as to questions of fact (the applicants had asserted that no issues of "fact," as distinguished from "conclusions of law" based on facts, remained to be determined as between the parties, and there was consequently no need for any "witnesses" as such).

This led to lengthy, repetitive and vexing confrontations between the applicants' agent and counsel and the President of the Court, since a controversy arose over the qualification of each witness (indeed, shortly to be qualified in each instance as an "expert") and the point or points to which his testimony or expertise was to be addressed in accordance with the Court's Rules. This exchange strongly resembled the battling involved in a municipal *voir dire*.¹²⁴ In the event, because of the manner in which the substantive aspects of the case had by then evolved (primarily as a result of a major amendment to the applicants' submissions), many of South Africa's witnesses-experts were obliged to manifest their expertise concerning the "existence or non-existence of an international norm or standard of non-discrimination."¹²⁵ In the end, it was clear that the Court did not need to consider

¹²³ "Given the grounds on which the Court bases its decision," the Court stated, "it becomes unnecessary to consider whether, at Preah Vihear, the line as mapped does in fact correspond to the true watershed line in this vicinity, or did so correspond in 1904-1908, or, if not, how the watershed line in fact runs." *Id.* at 35. See further the description in D. SANDIFER, *supra* note 25, at 35-36 and 338-40. Indeed, the major evidentiary significance of the *Temple* case remains its emphatic reliance on maps as evidence in relation to written treaty provisions describing the same features—a proposition with which there was nevertheless strong dissent. See Dissenting Opinions of Judges Sir Percy Spender and Moreno Quintana, 1962 ICJ REP. at 101, 133-34, and 67, 70; and *cf.* the rule of Article 29 of the Treaty of Versailles (text to prevail over maps) and discussion generally in D. SANDIFER, *supra*, at 232-33 and 237-38; see also *Frontier Land*, 1959 ICJ REP. at 220; see generally Weissberg, *supra* note 81.

¹²⁴ See Rules, Art. 57 *et seq.* See also D. SANDIFER, *supra* note 25, at 291-92, 309-12, and especially 340-41; and the foreword by Judge Philip Jessup, stating: "Most of the evidence received by the Court is documentary; the abundance of oral testimony by experts and witnesses for the Respondent in the *South-West Africa Cases* led to some confusion and complications." *Id.* at x.

¹²⁵ This ritual incantation preceded the testimony of each "witness-expert." The witnesses-experts made up an extraordinarily variegated company: the Commissioner-General for the Northern Sotho; a professor of social philosophy at New York University; a professor of social and cultural anthropology at the University of Port Elizabeth; a professor of geography at the University of California; the editor of *Die Burger* in Cape Town; the Vice-Chairman of the

whether the "facts" sought to be proven by the 14 witnesses-experts were or were not established, since the *ratio decidendi* of the 1966 Judgment left no room or necessity for an inquiry by the Court into the facts. The scope of the testimony-expertise, however, was as broad as it was lengthy, and the Court would have had its work cut out for it if it had not avoided the whole issue on jurisdictional grounds.¹²⁶

After the *South West Africa Cases*, there was an evidentiary lacuna in the Court's activities of some 15 years. Although complex and difficult factual questions were raised in the *Fisheries Jurisdiction* case, the issues were resolved on the basis of documents (the Court relying on the provisions of Article 53 to reach its conclusion, as respondent failed to appear in the proceedings).¹²⁷ In the *Nuclear Tests Cases*, the respondent state was also absent, but the proceedings were effectively discontinued on the ground of mootness.¹²⁸ This trend was reversed by the three maritime delimitation cases of the first half of the 1980s: the *Tunisia/Libya* case, the *Gulf of Maine* case and the *Libya/Malta* case.

In *Tunisia/Libya* the Court heard a variety of speeches by technical members of each side's delegation, and the testimony of one actual expert, a geomorphologist. Conflicting opinions were advanced about one of the critical issues in the case—whether the continental shelf north of the Tunisia-Libya boundary point at Ras Ajdir was more properly to be considered a natural extension of the Tunisian landmass eastward or of the Libyan landmass northward. Each side argued that, in application of the dictum in the *North Sea Continental Shelf Cases*,¹²⁹ the continental shelf under examination was "the [more] natural extension of [its] . . . land territory" into and under the sea.

Synod of the Dutch Reformed Church of South Africa and the Vice-Chancellor of the University of Stellenbosch; the head of the Department of Economics of the University of South Africa; the Director of Bantu Development in South Africa; the Deputy-Secretary of the Department of "Bantu Education"; the Rector of the University of Pretoria; the editor of the *Allgemeine Zeitung* in Windhoek; an American Brigadier and Chief Historian of the U.S. Army; a former professor of international relations at the University of London; and the Director of International Political Studies at the Hoover Institution of Stanford University.

¹²⁶ More properly, the Court would have had to determine whether there did "in fact" exist a "norm or standard of non-discrimination."

¹²⁷ *Fisheries Jurisdiction* (UK v. Ice.; FRG v. Ice.), Jurisdiction of the Court, 1973 ICJ REP. 3, 49 (Judgments of Feb. 2); and *Merits*, 1974 ICJ REP. 3, 175 (Judgments of July 24).

¹²⁸ *Nuclear Tests* (Austl. v. Fr.; NZ v. Fr.), 1974 ICJ REP. 253, 457 (Judgments of Dec. 20). See the comment by Judge Jessup in his foreword to D. SANDIFER, *supra* note 25, at x:

The Court itself, in utilizing its right to find evidence not proffered by the Parties, went to curious lengths in the *Nuclear Test Cases*, which were decided as recently as December 20, 1974. The Court, sua sponte, took cognizance of statements by French officials as reported in the press and elsewhere but not laid before the Court by the Parties. It must be noted that France refused to appear or to participate in the oral proceedings.

¹²⁹ *North Sea Continental Shelf Cases* (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 31, para. 43 (Judgment of Feb. 20).

To this end, the parties produced extensive and hotly contested evidence relating to geomorphology, geology and geography. A film was produced by Tunisia and shown to the Court, reminiscent of the film shown in the course of the *Temple* case.¹³⁰ Maps of great complexity and, in some cases, of antiquity were reproduced in the documents and laid before the Court. Bathymetric studies converted into computerized "block diagrams" formed part of the parties' written pleadings and documentary production. The testimony of the one actual expert was also subject to brief and somewhat desultory cross-examination by the other party. For all this effort, which consumed a large part of the pleadings and concerns of each side, the Court essentially found no convincing evidence militating in either direction and decided the case in that particular area of the delimitation on a form of attributed acquiescence by the parties in the line where their concessions met and overlapped.¹³¹

In the *Gulf of Maine* case, a great deal of documentary evidence was again laid before the Chamber relating to geology, geomorphology and geography. In addition, because the Special Agreement required the Chamber to find a "single maritime boundary" for purposes of both continental shelf exploitation and fishing, an enormous amount of highly technical evidence was offered about fish and shelf species: their ecological zones, habits, spawning grounds and feeding patterns. (There was also considerable discussion of the showing of a film by Canada, although ultimately it was not presented.) However, the Chamber did not find that any of this technical evidence was relevant or determinative; instead, it based its opinion primarily on a geographical solution and essentially ignored the factual controversies concerning aspects other than geography.¹³² It should further be noted that in the *Gulf of Maine* case the Chamber listened to an expert of the parties and also appointed its own expert to assist in preparing the line.¹³³

By the time the Court came to consider the *Libya/Malta* case, the principles of customary law largely expressed in the UN Convention on the Law of the Sea became in large measure the law of the case. The extensive and weighty evidence advanced by Libya, striving to prove that a fundamental geological/geomorphological discontinuity of such significant proportions existed that it should be considered as a division between two shelves or two areas of shelf, was totally disregarded by the Court; it again favored a wholly geographical solution—albeit this time more openly grounded on the law as reflected in the 1982 Convention.¹³⁴ Malta's case was based more on geography and in fact relied on relatively strict equidistance; nevertheless, it produced a rebuttal expert whose testimony was designed to disprove Libya's contention that there was a "fundamental discontinuity" in the shelf

¹³⁰ See note 121 *supra*.

¹³¹ See *Tunisia/Libya*, 1982 ICJ REP. at 117–18; and note 85 *supra*.

¹³² See *Gulf of Maine*, 1984 ICJ REP. at 273–78.

¹³³ *Id.* at 256 and 265 (referring to the Order of Mar. 30, 1984).

¹³⁴ *Libya/Malta*, 1985 ICJ REP. at 29–38, paras. 26–44 (*especially* paras. 35–41, at 34–37).

between them. Libya had produced several experts to substantiate this claim and had also developed a three-dimensional computerized model of the sea floor, which was used as a demonstrative aid.¹³⁵

The *Nicaragua* case comes closest to the *Corfu Channel* case in number of witnesses and scope of testimony.¹³⁶ There were five witnesses before the Court, and no experts.¹³⁷ Owing to the absence of the United States from this phase of the proceedings, it was not possible to refine the testimony of the witnesses or for the Court to benefit from even the rudimentary form of cross-examination that had taken place in earlier cases. However, the Court and the judges tried to fill the gap:

Questions were put by Members of the Court to the witnesses, as well as to the Agent and counsel of Nicaragua, and replies were given either orally at the hearing or subsequently in writing. On 14 October 1985 the Court requested Nicaragua to make available certain further information and documents, and one Member of the Court put a question to Nicaragua.¹³⁸

The Court was thus obliged to sift through the testimony presented and to do more than its usual share of balancing probabilities and excluding insufficient proofs.¹³⁹ The Court also took pains—particularly since it was proceeding in the absence of the respondent—to consider the likelihood of any general a priori tilt or bias in the evidence that it heard.¹⁴⁰

¹³⁵ By the end of the *Libya/Malta* case, the following pattern had developed: an expert would give his testimony in the form of a rehearsed statement that was in "response" to prearranged questions by counsel. This technique managed to convey the feel of "live" testimony on direct examination without many of its accompanying risks; of course, it was still open to cross-examination.

¹³⁶ See notes 108–120 *supra* and accompanying text.

¹³⁷ "The following witnesses were called by Nicaragua and gave evidence: Commander Luis Carrión, Vice-Minister of the Interior of Nicaragua . . . ; Dr. David MacMichael, a former officer of the United States Central Intelligence Agency . . . ; Professor Michael John Glennon . . . ; Father Jean Loison . . . ; [and] Mr. William Huper, Minister of Finance of Nicaragua. . . ." *Nicaragua Merits*, 1986 ICJ REP. at 18, para. 13.

¹³⁸ *Id.*

¹³⁹ This was done, for example, with the evidence of Mr. MacMichael relating to support of the Salvadoran insurgency by Nicaragua in 1981:

In short, the Court notes that the evidence of a witness called by Nicaragua in order to negate the allegation of the United States that the Government of Nicaragua had been engaged in the supply of arms to the armed opposition in El Salvador only partly contradicted that allegation.

Id. at 74–75, para. 135.

¹⁴⁰

The Court has had to attach considerable significance to the declarations made by the responsible authorities of the States concerned in view of the difficulties which it has had to face in determining the facts. Nevertheless, the Court was still bound to subject these declarations to the necessary critical scrutiny. A distinctive feature of the present case was that two of the witnesses called to give oral evidence on behalf of Nicaragua were members of the Nicaraguan Government, the Vice-Minister of the Interior (Commander Carrión), and the Minister of Finance (Mr. Huper). The Vice-Minister of the Interior was also the author of one of the two declarations annexed to the Nicaraguan Memorial on the merits, the author of the other being the Minister for Foreign Affairs. On the United States side,

Expert Inquiry: Inspection

The Court appointed its own experts in two of the cases under discussion: *Chorzów* and *Corfu*.¹⁴¹ The matters resolved by the experts in these cases were intricate and demanding of a high degree of technical competence. In a paragraph of the *Nicaragua* decision, the Court detoured briefly to raise the possibility of appointing an individual or body to conduct an inquiry in the way this had been done in the *Corfu Channel* case; the Court also indicated that "such a body could be a group of judges selected from among those sitting in the case." The Court then continued:

In the present case, however, [it] felt it was unlikely that an enquiry of this kind would be practical or desirable, particularly since such a body, if it was properly to perform its task, might have found it necessary to go not only to the applicant State, but also to several other neighbouring countries, and even to the respondent State, which had refused to appear before the Court.¹⁴²

Supposition appears to be justified that this matter was discussed at some length within the Court, but that it was resolved with appropriate caution in view particularly of the U.S. nonappearance in the merits phase.¹⁴³

In one instance before the Permanent Court, the special agreement between the parties actually provided for a delegation of one or more judges at a party's request "to conduct investigations on the spot,"¹⁴⁴ although such a request was not in fact acceded to by the Court.¹⁴⁵ Of the sole instance where the Court exercised its inspection powers, Judge Hudson commented:

an affidavit was filed sworn by the Secretary of State. These declarations at ministerial level on each side were irreconcilable as to their statement of certain facts.

Id. at 42–43, para. 69. *But see* Judge Schwebel's dissenting opinion, *id.* at 277, para. 27, for an important qualification:

[T]here can be no equation between *governmental statements made in this Court and governmental statements made outside of it*. . . . Deliberate misrepresentations by the representatives of a government Party . . . cannot be accepted because they undermine the essence of the judicial function. This is particularly true where, as here, such misrepresentations are of facts that arguably are essential, and incontestably are material, to the Court's Judgment. [emphasis added].

¹⁴¹ The Chamber's "technical expert" appointed in *Gulf of Maine* had a different and more limited capacity, and is therefore not being discussed under this head. *See* 1984 ICJ REP. at 256, para. 8 (and, for his technical report, *id.* at 347–52).

¹⁴² *Nicaragua Merits*, 1986 ICJ REP. at 40, para. 61.

¹⁴³ These difficulties are surely reminiscent of those raised during consideration of the "safari proposal" in *South West Africa (Second Phase)*; *see* D. SANDIFER, *supra* note 25, at 346–48. *See* particularly, however, Judge Schwebel's endorsement of a fact-finding inquiry in "Nicaragua, the United States, El Salvador, Honduras, Costa Rica, Guatemala and Cuba, an enquiry which could have sought access to probative data which certain governments claimed to possess, and which could have examined knowledgeable persons who were unable or unwilling otherwise to appear before the Court." 1986 ICJ REP. at 322, para. 132.

¹⁴⁴ *Free Zones*, 1932 PCIJ, ser. C, No. 17-I, at 493; 2 HUDSON REPORTS, *supra* note 49, at 510. *See* D. SANDIFER, *supra* note 25, at 345 n. 211; and M. HUDSON, *supra* note 21, at 566.

¹⁴⁵ *Free Zones*, 1932 PCIJ, ser. A/B, No. 46, at 162–63; M. HUDSON, *supra* note 21, at 566.

In the *Meuse* Case, after the Netherlands agent had completed his first oral argument, the Belgian agent suggested that the Court should make a *descente sur les lieux* to enable the judges to see the canals, waterways and installations involved in the proceedings; the suggestion was viewed not as an offer to present evidence, but as an invitation to the Court to procure its own information for a better understanding of the case.¹⁴⁶

In a later instance (the second phase of the *South West Africa Cases*), the South African Government invited the Court ("or a committee thereof") to undertake a visit (in the form of an "inspection") to the then Mandated Territory of South West Africa, together with the territories of the applicant states Ethiopia and Liberia and several other independent African states. Following extensive argument during the oral proceedings, this proposal was rejected by the Court.¹⁴⁷ The issue was clouded enough at the time because of the ambiguous terms of reference of this request and the complex litigation issues surrounding it. It has not benefited from subsequent attempts at clarification by commentators.¹⁴⁸ One element stands out clearly, however: the South African proposal did not envisage the actual taking of testimony or gathering of other evidence, and so the "inspection"—had it taken place—would have been somewhat similar to the precedent of the *Meuse* case.¹⁴⁹

WHEN EVIDENCE IS NOT PRODUCED

Nonappearance

In the *Nicaragua* case, the Court recognized that

the failure of the respondent State to appear in the merits phase of these proceedings has resulted in two particular disadvantages. First, the absence of the United States meant that the evidence of the witnesses presented by the Applicant at the hearings was not tested by cross-examination; however, those witnesses were subjected to extensive questioning from the bench. Secondly, the Respondent did not itself present any witnesses of its own. This latter disadvantage merely represents one aspect, and a relatively secondary one, of the more general disadvantage caused by the non-appearance of the Respondent.¹⁵⁰

¹⁴⁶ M. HUDSON, *supra* note 21, at 566–67. Sandifer adds: "What use, if any, the Court may have made of the information thus gained is not indicated in its Judgment." D. SANDIFER, *supra* note 25, at 345.

¹⁴⁷ 1965 ICJ REP. 9 (Order of Nov. 29). "The surprising aspect of [the divided vote of 8 to 6 in the Order of Nov. 29, 1965 on the visit to South West Africa] is the number of Judges who thought the Court should undertake the inspection." D. SANDIFER, *supra* note 25, at 348.

¹⁴⁸ See, e.g., S. SLONIM, *SOUTH WEST AFRICA AND THE UNITED NATIONS: AN INTERNATIONAL MANDATE IN DISPUTE* 244–49 (1973); and T. D. GILL, *SOUTH WEST AFRICA AND THE SACRED TRUST 1919–1972*, at 61–63 (1984). See also D. SANDIFER, *supra* note 25, at 345–48, and review thereof by the present writer in 71 AJIL 155, especially at 158 (1977).

¹⁴⁹ Nevertheless, in the extensive argument on this question, no doubt was expressed as to the powers of the Court to take testimony should it deem it appropriate in the context of the litigation. See the discussion *supra*, text at notes 108–120, of the extraordinarily detailed work accomplished by the Court's own experts in the *Corfu Channel* case.

¹⁵⁰ 1986 ICJ REP. at 42, para. 67.

The Court's sensitivity to factual issues and ability to deal with them has in fact been sharpened, and not blunted, by the increasing incidence and popularity of what has been termed the "no-appearance technique" of litigation.¹⁵¹ In cases of deliberate nonappearance, where the Court is burdened with the statutory duty of satisfying itself "not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law,"¹⁵² considerable care must be exercised in determining any facts presented unilaterally by the appearing party but considered indispensable to the decision. Indeed, this is precisely what occurred in the merits phase of the *Nicaragua* case: more directly than any other decision of the Court, the *Nicaragua* decision treats the relationship between the Court's ability to find evidence satisfactorily and the dilemma presented by Article 53. "One of the Court's chief difficulties in the present case," said the Court, "has been the determination of the facts relevant to the dispute."¹⁵³ Possibly just because of this problem, the merits phase of the *Nicaragua* case is easily the most significant judgment rendered by the Court in the matter of evidence since *Corfu Channel*. Paragraphs 57 through 171—or some 55 pages—of the Judgment concern the finding of facts.¹⁵⁴

Use of circumstantial evidence and inference increases in inverse proportion to the quantity of other evidence available. "The necessity to admit circumstantial evidence derives from the rule of substantive law that a State on whose territory an act contrary to international law has occurred may be called upon to give an explanation."¹⁵⁵ This is only logical. The sovereignty of each state is absolute over its territory; a party to litigation before the Court can therefore exercise unfettered ability to prevent discovery and determination of essential facts. The *Corfu Channel* case exemplified a cogent solution to this problem: in the absence of any forthcoming explanation, Albania was in essence held liable on the basis of the circumstantial evidence

¹⁵¹ See Fitzmaurice, *The Problem of the 'Non-Appearing' Defendant Government*, 51 BRIT. Y.B. INT'L L. 89 (1980); see also G. GUYOMAR, *LE DÉFAUT DES PARTIES À UN DIFFÉREND DEVANT LES JURIDICTIONS INTERNATIONALES* (1960); Sinclair, *Some Procedural Aspects of Recent International Litigation*, 30 INT'L & COMP. L.Q. 338 (1981); J. ELKIND, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* (1984); and H. THIRLWAY, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* (1985).

¹⁵² ICJ Statute, Art. 53, para. 2. The Court has now stated:

The use of the term "satisfy itself" in the English text of the Statute (and in the French text the term "s'assurer") implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, *so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence.*

Nicaragua Merits, 1986 ICJ REP. at 24, para. 29 (emphasis added).

¹⁵³ 1986 ICJ REP. at 38, para. 57. In paragraph 30 of the Judgment, the Court stated that it "cannot by its own enquiries entirely make up for the absence of one of the Parties; that absence, in a case of this kind involving extensive questions of fact, must necessarily limit the extent to which the Court is informed of the facts." *Id.* at 25.

¹⁵⁴ See, e.g., para. 126, *id.* at 70: "The Court has therefore to ascertain, so far as possible, the facts on which this claim [of collective self-defense against Nicaraguan aggression] is or may be based, in order to determine whether collective self-defence constitutes a justification of the activities of the United States here complained of."

¹⁵⁵ 2 S. ROSENNE, *supra* note 30, at 582.

of the finding of mines in its territorial waters when it must or should have been aware of their actual laying—if not by Albania itself, then by Yugoslavia.¹⁵⁶

Significantly, if a state pleads the secrecy or unavailability of evidence requested by another state, the Court is quite prepared to exercise its inferential or deductive approach in arriving at a conclusion independent of that plea of secrecy. In the *Nicaragua* case—where, of course, the respondent did not appear on the merits—the question of “intelligence information” did not arise directly, but rather on a collateral matter (regarding which certain other facts had not been disclosed because their production would allegedly have compromised intelligence sources).¹⁵⁷ It is hard to imagine, however, that the Court will generally give so uncharacteristically broad a benefit of the doubt to a nonproducing state that its asserted conclusions about such evidence will be accepted without more. The Court’s practice will in fact continue to be to disregard any assertions unsupported by evidence actually produced; the Court will still have “*no means of assessing the reality or cogency of the undivulged evidence* which the [nonproducing state] claimed to possess.”¹⁵⁸ Why contrary evidence is not being produced is not determinative; what is critical is that it has not indeed been produced, and thus the evidence of the applicant has not been controverted.

Nonproduction by reason of territorial sovereignty will result in the same response as nonproduction by reason of a form of executive privilege relating to intelligence material. In essence, this response merely extends the sensible principle expressed in the *Corfu Channel* case:

[T]he fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions.¹⁵⁹

It is therefore not only because of the Court’s inability to compel evidentiary production that it has relied heavily on the strict application of the doctrine of the burden of proof and the acceptance of circumstantial evi-

¹⁵⁶ 1949 ICJ REP. at 18; see also 2 S. ROSENNE, *supra* note 30, at 582. He notes the cautionary words of the Court: “Here the Court uttered its word of caution, saying: ‘The proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt’ (italics in original . . .).” *Id.*

¹⁵⁷ In the controversy surrounding the *Nicaragua* case and the withdrawal of the United States, it has been stressed that much of the evidence that the United States would have been required to produce was of a sensitive “intelligence” nature, and that its production would imperil the intelligence sources involved and thus be adverse to U.S. national security interests. From this, a logically circular conclusion is advanced: i.e., that the existence of this dilemma proves that the Court was never intended to have jurisdiction over “national security” matters of this type, in the first instance.

¹⁵⁸ *Nicaragua Merits*, 1986 ICJ REP. at 84, para. 155 (emphasis added).

¹⁵⁹ 1949 ICJ REP. at 18.

dence; it is also because of the situation generally produced by any form of nonproduction, noncooperation and nonappearance. There is a strong analytic similarity between instances where evidence is not produced because it is claimed to be derived from sensitive intelligence sources, and instances where evidence is not produced because one party is absent from the proceedings and the Court is proceeding under Article 53. It is particularly in the latter cases that a hierarchy of levels of proof can be most clearly visualized; the Court has to be clear at each step as to why it is considering a given conclusion to be "well founded in fact."¹⁶⁰

Inference

Traditionally, the Court has operated in important areas of factual conclusions by an informed process of inference. The inferential method may be "negative," in that it seeks to conclude about a state of affairs because of a failure to deny or rebut it. Thus, what is not denied may well be accepted: for example, overflights by U.S. military aircraft in the *Nicaragua* case.¹⁶¹ What is asserted, but only partially contradicted, may be found to be partially valid: for example, the partial negation of the U.S. allegation that Nicaragua had been supplying arms to the Salvadoran opposition,¹⁶² and the partial rebuttal of allegations concerning border incidents involving Honduras and Costa Rica.¹⁶³ A more sophisticated variation on the Court's use of inference is exemplified by the significant conclusion drawn in the *Nicaragua* case that the United States could not have considered Nicaragua to have been engaged in an "armed attack" properly giving rise to the collective right of self-defense because the United States had not complied with the requirements of Article 51 governing the exercise of such a right.¹⁶⁴ A similar inference was applied to El Salvador.¹⁶⁵

¹⁶⁰ The hierarchy appears to be substantially as follows: (1) uncontrovertible matters of public knowledge (matters that are notorious or universally known) as to which the Court can in effect take "judicial notice"; (2) statements made by high officials of the government(s) concerned "against interest" in the context of the case at hand, from which inferences can be drawn or which, taken at face value, confirm the state's responsibility for subsequent events presumed to be the reasonably likely consequence of the intention imparted by the statement; and (3) press statements of facts against the interest of the state concerned, which are not controverted or denied by responsible officials.

¹⁶¹ 1986 ICJ REP. at 51-53, paras. 87-91.

¹⁶² *Id.* at 74-75, para. 135. But see on this point Judge Schwebel, *id.* at 329-30, paras. 150-51.

¹⁶³ Judgment, *id.* at 87, para. 163.

¹⁶⁴

At no time, up to the present, has the United States Government addressed to the Security Council, in connection with the matters the subject of the present case, the report which is required by Article 51 of the United Nations Charter in respect of measures which a State believes itself bound to take when it exercises the right of individual or collective self-defence. . . . [T]his conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter.

Id. at 121, para. 235 (emphasis added).

¹⁶⁵

The States concerned did not behave as though there were an armed attack at the time when the activities attributed by the United States to Nicaragua, without actually constituting an

The inferential process may also be "affirmative"; it may engage the responsibility of a state on the presumption that the state must have intended the likely or reasonably foreseeable consequences of an earlier statement or action. Thus, in the *Nicaragua* case the responsibility of the United States was determined (via the Central Intelligence Agency) in respect of the publication and dissemination of a manual on psychological operations: "The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties."¹⁶⁶ A broader example of this process relates to the question whether U.S. support of the "contras" constituted a violation of the principle of nonintervention:

Even if it be accepted, for the sake of argument, that the objective of the United States in assisting the *contras* was solely to interdict the supply of arms to the armed opposition in El Salvador, it strains belief to suppose that a body formed in armed opposition to the Government of Nicaragua, and calling itself the "Nicaraguan Democratic Force", intended only to check Nicaraguan interference in El Salvador and did not intend to achieve violent change of government in Nicaragua.¹⁶⁷

The Court further adopted the inferential approach in the *Nicaragua* case in dealing with the question of the supply of weapons from Nicaragua to El Salvador, which involved the alleged failure of the United States in 1981 "to provide the Nicaraguan authorities, as it had on previous occasions, with the specific information and details that would have enabled them to call a halt to it."¹⁶⁸ The Court said that "if this evidence really existed, the United States could be expected to have taken advantage of it in order to forestall or disrupt the traffic observed";¹⁶⁹ and continued:

attack, were nevertheless the most accentuated; they did so behave only at a time when these facts fell furthest short of what would be required for the Court to take the view that an armed attack existed on the part of Nicaragua against El Salvador.

Id. at 122, para. 236 (emphasis added).

¹⁶⁶ *Id.* at 130, para. 256. The key fact upon which the inference was grounded was the finding by the Court

that at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law; it was in fact even claimed by the CIA that the purpose of the manual was to "moderate" such behaviour.

Id. (The ninth paragraph of the *dispositif* related to this claim; it is notable that Judge Schwebel of the United States voted in favor of it.)

¹⁶⁷ *Id.* at 124, para. 241 (emphasis added).

¹⁶⁸ *Id.* at 84, para. 155. "Since the Government of the United States has justified its refusal by claiming that any disclosure would jeopardize its sources of information, the Court has no means of assessing the reality or cogency of the undivulged evidence which the United States claimed to possess." *Id.*

¹⁶⁹ *Id.* at 84, para. 156 (emphasis added). "[I]t could presumably for example arrange for the deployment of a strong patrol force in El Salvador and Honduras, along the frontiers of these States with Nicaragua." *Id.*

*If, on the other hand, this evidence does not exist, that . . . implies that the arms traffic is so insignificant and casual that it escapes detection even by the sophisticated techniques employed for the purpose, and that, a fortiori, it could also have been carried on unbeknown to the Government of Nicaragua, as that Government claims. These two conclusions mutually support each other.*¹⁷⁰

In general, the Court tried to take considerable care in balancing the evidence that had come before it, necessarily mostly from one side, and in utilizing its traditional process of inference and deduction to find the facts upon which the legal findings would be based. It used such a "balancing process" in *Nicaragua*, for example, in connection with the flow of arms to El Salvador between 1979 and 1981.¹⁷¹ Since Nicaragua was the applicant and the United States had failed to appear on the merits (and had therefore filed no counterclaim), there was naturally more evidence "balanced up" adverse to the United States than there was adverse to Nicaragua.¹⁷² Another example is found in the progression of conclusions leading up to the significant holding in the case that "it is established that the *contra* force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States."¹⁷³

¹⁷⁰ *Id.* at 84–85, para. 156 (emphasis added).

¹⁷¹

On the basis of the foregoing, the Court is satisfied that, between July 1979, the date of the fall of the Somoza régime in Nicaragua, and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. *On the other hand*, the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period.

Id. at 86, para. 160 (emphasis added).

¹⁷² *But see* the Dissenting Opinion of Judge Schwebel:

The facts are in fundamental controversy. I find the Court's statement of the facts to be inadequate, in that it sufficiently sets out the facts which have led it to reach conclusions of law adverse to the United States, while it insufficiently sets out the facts which should have led it to reach conclusions of law adverse to Nicaragua.

Id. at 266–67, para. 2. And: "the Court, partially because of its misapplication of the rules of evidence which it has articulated for this case, has even failed adequately to recognize and appraise the facts which do appear in the record of the proceedings and in this dissenting opinion." *Id.* at 296, para. 75. See also, in the context of official statements: "It is the fact that these rules of evidence when applied will cut in favour of a government of the nature of that of the Government of Nicaragua and against a government of the nature of that of the Government of the United States." *Id.* at 324, para. 139. (See also Dissenting Opinion of Judge Oda, *id.* at 212, 243–44, paras. 64, 65.)

¹⁷³ *Id.* at 63, para. 111. The Court held that it "is not satisfied that all the operations launched by the *contra* force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States. However, . . . support of the United States authorities for the activities of the *contras* took various forms over the years . . ." (*id.* at 61, para. 106). Thus, "the Court has not been able to satisfy itself that the respondent State 'created' the *contra* force in Nicaragua" (*id.* at 61, para. 108), but "[o]n the other hand, the Court holds it established that the United States authorities largely financed, trained, equipped, armed and organized the FDN" (*id.* at

One observation about the *Nicaragua* case is necessary at this stage. There will doubtless be substantial critical comment about the Court's method: about what will be termed the use of bold inferences and heroic assumptions in Nicaragua's favor, where (it will be alleged) such assumptions and inferences were not justified by the "actual" situation.¹⁷⁴ Yet this article cannot purport to be a considered evaluation of the accuracy or correctness of the Court's findings in *Nicaragua*; it can only report the Court's method, as chronicled somewhat laboriously by the Court itself.

Three points, however, should be specifically emphasized. *First*: not all the favorable inferences were made in favor of Nicaragua; some were favorable to the United States and contrary to Nicaragua. *Second*: it would be a bad mistake to evaluate the decision in the *Nicaragua* case without recognizing that it also represents the most dramatic and serious instance of nonappearance (or disappearance) of a party ever to confront the Court, and to forget the overall implications of the Court's duty to proceed under Article 53 in such a complex factual case.

The *third* point flows directly from the second: *what other result could really have been anticipated, once the United States had deliberately chosen to dissociate itself from the merits of the case?* Even if the Court's decision on the merits may be open to criticism, was the Court not—in essence—forced into an impossible corner by the respondent's absence from the proceedings?¹⁷⁵

Admissions

In the *Nicaragua* case, the Court, forced as it was to evaluate matters without the respondent's advancing opposing evidence or cross-examining the applicant's witnesses, arrived at a process of taking at face value the public statements of high officials when those statements were arguably made against the legal interest of the state in whose government the officials served. This was mainly applied, but was not limited to, the respondent United States; it was also applied to Nicaraguan officials. In the early part of the decision, the Court stated:

The material before the Court also includes statements by representatives of States, sometimes at the highest political level. Some of these statements were made before official organs of the State or of an international or regional organization, and appear in the official records

62, para. 108) even though "there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf" (*id.* at 62, para. 109). The Court said it had insufficient evidence to reach a finding on whether the U.S. Government ever "devised the strategy and directed the tactics of the *contras* It is *a fortiori* unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States" (*id.* at 62-63, para. 110).

¹⁷⁴ See, e.g., quotations from Dissenting Opinion of Judge Schwebel, *supra* note 172, and further at 1986 ICJ REP. at 331, para. 153; and Dissenting Opinion of Judge Oda, *id.* at 243-44, para. 64.

¹⁷⁵ See, e.g., quotations from Dissenting Opinion of Judge Sir Robert Jennings, text at notes 13 and 14 *supra*, and discussion, text at notes 13-16 *supra*.

of those bodies. Others, made during press conferences or interviews, were reported by the local or international press. The Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. *They may then be construed as a form of admission.*¹⁷⁶

This method was applied to statements made by President Reagan¹⁷⁷ and by Secretary of State Shultz,¹⁷⁸ for the United States; and by President Ortega,¹⁷⁹ for Nicaragua. In addition, the quotation (by the press) of "United States administration sources" assisted in establishing the Court's conclusions that the United States was responsible for mining the Nicaraguan harbors¹⁸⁰ and, among other similar facts, that the CIA was responsible for production of a psychological warfare manual.¹⁸¹ The Court, however, was at evident pains to point out the limitations when the public statements of high officials were not "against the interest" of the state concerned but, rather, in its favor.¹⁸² The Court commented on these "declarations at ministerial level" as follows:

¹⁷⁶ 1986 ICJ REP. at 41, para. 64 (emphasis added).

¹⁷⁷ A refusal to comment was treated as an admission, *id.* at 49, para. 83. Presidential statements were also used in a corroborative sense, *id.* at 47, para. 78 (citing a televised interview stating: "Those were homemade mines . . . planted in those harbors . . . by the Nicaraguan rebels"), leading to the conclusion, *id.* at 48, para. 80 ("the Court finds it established that . . . the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports").

¹⁷⁸ *Id.* at 71-73, paras. 128 and 131. In considering Nicaragua's conduct in relation to Honduras and Costa Rica, the Court examined "only the allegations of direct cross-border attacks, since the affidavit of Mr. Shultz claims only that there was support by the provision of arms and supplies for military and paramilitary activities 'on a smaller scale' in those countries than in El Salvador." *Id.* at 73, para. 131.

¹⁷⁹ *Id.* at 79-82, paras. 144-151, citing an interview of President Ortega published in the *New York Times Magazine*, *id.* at 79, para. 144; and a *New York Times* report that he had stated that measures were being taken to prevent further use of an airstrip in Nicaragua for certain purposes, *id.* at 82, para. 151 ("This, in the Court's opinion, is an admission of certain facts, such as the existence of an airstrip designed to handle small aircraft, probably for the transport of weapons, the likely destination being El Salvador, even if the Court has not received concrete proof of such transport").

¹⁸⁰ *Id.* at 50, para. 86. See also *id.* at 47, para. 78 ("According to press reports quoting sources in the United States administration, the laying of mines was effected from speed boats, not by members of the ARDE or FDN, but by the 'UCLAs'").

¹⁸¹ "According to the press, CIA officials presented to the Intelligence Committee in 1984 evidence of [terrorist behavior or atrocities] . . . and stated that this was the reason why the manual was prepared, it being intended to 'moderate the rebels' behaviour'." The Court found confirmation of this report in "the finding of the Intelligence Committee that 'The original purpose of the manual was to provide training to moderate FDN behaviour in the field'." *Id.* at 68, para. 121.

¹⁸²

However, it is natural also that the Court should treat such statements [made by high officials of the states concerned] with caution, whether the official statement was made by an authority of the Respondent or of the Applicant. Neither Article 53 of the Statute, nor any other ground, could justify a selective approach, which would have undermined the consistency of the Court's methods and its elementary duty to ensure equality between

[T]his evidence is of such a nature as to be placed in a special category. In the general practice of courts, two forms of testimony which are regarded as *prima facie* of superior credibility are, first the evidence of a disinterested witness—one who is not a party to the proceedings and stands to gain or lose nothing from its outcome—and secondly so much of the evidence of a party as is against its own interest.¹⁸³

From this, the Court proceeded to take the *unfavorable* evidence as probative, but in general to reject the *favorable* evidence as not being disinterested or veracious:

The Court . . . can certainly retain such parts of the evidence given by Ministers, orally or in writing, as may be regarded as contrary to the interests or contentions of the State to which the witness owes allegiance, or as relating to matters not controverted. For the rest, while in no way impugning the honour or veracity of the Ministers of either Party who have given evidence, the Court considers that the special circumstances of this case require it to treat such evidence with great reserve.¹⁸⁴

There must, however, be limits on the Court's freedom to find facts by way of admission. For example, the Court was not prepared to accept that the assertion by the United States of the right of collective self-defense was tantamount to " 'a major admission of direct and substantial United States involvement in the military and paramilitary operations' directed against Nicaragua."¹⁸⁵ Acknowledging that "[t]his reasoning would do away with any difficulty in establishing the facts, which would have been the subject of an implicit overall admission by the United States, simply through its attempt to justify them by the right of self-defence," the Court continued by stating that "in the present case the United States has not listed the facts or described the measures which it claims to have taken in self-defence; nor has it taken the stand that it is responsible for all the activities of which Nicaragua accuses it but such activities were justified by the right of self-defence."¹⁸⁶ The Court

the Parties. The Court must take account of the manner in which the statements were made public; evidently, it cannot treat them as having the same value irrespective of whether the text is to be found in an official national or international publication, or in a book or newspaper. It must also take note whether the text of the official statement in question appeared in the language used by the author or on the basis of a translation (cf. *I.C.J. Reports 1980*, p. 10, para. 13). It may also be relevant whether or not such a statement was brought to the Court's knowledge by official communications filed in conformity with the relevant requirements of the Statute and Rules of Court. Furthermore, the Court has inevitably had sometimes to interpret the statements, to ascertain precisely to what degree they constituted acknowledgments of a fact.

Id. at 41, para. 65.

¹⁸³ *Nicaragua Merits*, 1986 ICJ REP. at 43, para. 69.

¹⁸⁴ *Id.* at 43, para. 70. This principle was applied, *inter alia*, to the affidavit of Secretary of State Shultz that had been annexed to the Counter-Memorial of the United States. *Id.* at 71-72, para. 128 ("the Court would recall the observations it has already made . . . as to the evidential value of declarations by ministers of the government of a State engaged in litigation concerning an armed conflict"). *But see* Dissenting Opinion of Judge Schwebel, *id.* at 271-72, para. 14; and part G of the "Factual Appendix" thereto, *id.* at 410-11, para. 27.

¹⁸⁵ 1986 ICJ REP. at 45, para. 74.

¹⁸⁶ *Id.*

concluded that it "thus cannot consider reliance on self-defence to be an implicit general admission on the part of the United States; but it is certainly a recognition as to the imputability of some of the activities complained of."¹⁸⁷

Public Knowledge and Press Reports

It would be inappropriate to leave this analysis of evidence without also commenting on the use of judicial notice and public knowledge in the two cases in which the United States has been prominently involved: the first, the *Hostages* case, with the United States present and Iran absent; and the second, the *Nicaragua* case (Merits), with the United States absent and Nicaragua present. In each case the Court was naturally required to proceed under Article 53 of the Statute. In the former, the Court specifically stated as follows:

The essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries. . . .

. . . The result is that the Court has available to it a massive body of information from various sources concerning the facts and circumstances of the present case, including numerous official statements of both Iranian and United States authorities.¹⁸⁸

This comment is useful in analyzing the role played by judicial notice and the observation of "current events" by the judges. In the position of the International Court, this is a necessary, if not an inevitable, step in accumulating the factual evidence upon which determinations as to international responsibility can proceed to be founded.¹⁸⁹

In the *Nicaragua* case, the Court referred to the *Hostages* case in discussing the use of judicial notice of facts that are public knowledge, largely conveyed in the form of press information.¹⁹⁰ Particularly because the respondent failed to appear during the merits phase of the *Nicaragua* case, as well as because of the widely publicized nature of the respondent's alleged acts in relation to Nicaragua, the Court was naturally confronted with a wide range of information and assertion, no small part of which was culled from reports and stories in the public press. A classic example of public knowledge in the case concerned the determination of the existence of joint military maneuvers

¹⁸⁷ *Id.*

¹⁸⁸ 1980 ICJ REP. at 9-10, paras. 12 and 13.

¹⁸⁹ See also comments by Judge Jessup quoted in note 128 *supra*.

¹⁹⁰ The Court referred to its statement in paragraph 9 of the *Hostages* case quoted in text at note 188 *supra*, and continued as follows:

The Court has however to show particular caution in this area. Widespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source. It is with this important reservation that the newspaper reports supplied to the Court should be examined in order to assess the facts of the case, and in particular to ascertain whether such facts were matters of public knowledge.

1986 ICJ REP. at 41, para. 63.

between the United States and Honduras near the Honduras-Nicaragua frontier: "As evidence of these manoeuvres having taken place, Nicaragua has offered newspaper reports; since there was no secrecy about the holding of the manoeuvres, the Court considers that it may treat the matter as one of public knowledge, and as such, sufficiently established."¹⁹¹ Sometimes, when otherwise unsupported, the Court disregarded mere allegations reported in the newspapers, such as that of CIA responsibility for a publication¹⁹² and "statements attributed . . . to unidentified diplomats stationed in Managua" about arms supply and training of Salvadoran rebels.¹⁹³ Press reports, when significant and not denied by the responsible state, or when recounting events such as official statements by responsible officials and agencies of that state, are accepted;¹⁹⁴ but when uncorroborated or not otherwise containing material with an independent title of credibility and persuasiveness, are generally discounted almost entirely.

Quite naturally, a failure to deny facts reported in the press tends to permit the Court to take those facts as accurate and well founded. This inferential approach can be a two-edged sword; it was applied to Nicaragua¹⁹⁵ as well as to the United States.¹⁹⁶ In addition, the Court demonstrated considerable caution in portions of the *Nicaragua* case regarding reliance on press reports (for example, concerning allegations by the United States that Nicaragua was supporting insurrection in El Salvador).¹⁹⁷

Insufficient Evidence

In several instances the Court in the *Nicaragua* case determined generally that there was insufficient evidence to prove a point.¹⁹⁸ There was no "direct

¹⁹¹ *Id.* at 53, para. 92.

¹⁹² *Id.* at 65-66, para. 117.

¹⁹³ *Id.* at 80, para. 146 ("While the Court is not prepared totally to discount this material, it cannot find that it is of any great weight in itself").

¹⁹⁴ *But see* Dissenting Opinion of Judge Schwebel, *id.* at 317, para. 120, and 324, paras. 138-39.

¹⁹⁵

[T]he declaration of the Nicaraguan Foreign Minister . . . while repudiating the accusation of support for the armed opposition in El Salvador, did not refer at all to the allegation of border incidents involving Honduras and Costa Rica.

. . . The Court, while not as fully informed on the question as it would wish to be, therefore considers as established the fact that certain trans-border military incursions into the territory of Honduras and Costa Rica are imputable to the Government of Nicaragua.

1986 ICJ REP. at 87, paras. 163-64 (emphasis added).

¹⁹⁶ Regarding press attribution of responsibility for attacks on Nicaraguan ports to the CIA's "UCLAs": "So far as the Court is aware, no denial of the report was made by the United States administration." *Id.* at 50, para. 84 (emphasis added). (The denial would, of course, be expected to follow the press report within a reasonable time, and would not be made in court, since the party that would be in the position of offering the denial was no longer participating in the case and the Court was proceeding under Article 53.) Concerning lack of denial of press reports, see also *id.* at 52, para. 89. See further note 180 *supra* and accompanying text.

¹⁹⁷ See note 193 *supra* and accompanying text, and especially para. 146 of the Judgment cited therein. See, in contrast, Dissenting Opinion of Judge Schwebel, 1986 ICJ REP. at 317, para. 120, and 326-31, paras. 145-53.

¹⁹⁸ See Dissenting Opinion of Judge Oda, 1986 ICJ REP. at 240-41, para. 61, and examples given.

evidence of the size and nature of the mines" laid in the Nicaraguan ports.¹⁹⁹ There was no evidence of U.S. involvement in the planning or execution of certain attacks on Nicaraguan installations.²⁰⁰ There was no evidence relating to "the military effectiveness of" the contra bands.²⁰¹ Most importantly, "despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf."²⁰² "In sum, the evidence available to the Court indicates that the various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid."²⁰³ Acts committed by the *contras* were not imputable to the United States, because the Court was "not satisfied that the evidence available demonstrates that the *contras* were 'controlled' by the United States when committing [unlawful] acts,"²⁰⁴ any more than publication of a document entitled *Freedom Fighter's Manual* was found to be attributable to the United States.²⁰⁵

Where the Court is proceeding by a relatively painstaking examination of what has, and what has not, been denied or proved, it can readily be seen that the lack of specificity common to many political and diplomatic statements will result in an inadequacy of proof or persuasion. Thus, in the *Nicaragua* case the Court rejected the assertion by the United States in its Counter-Memorial on jurisdiction and admissibility that " 'El Salvador, Honduras, and Costa Rica have each sought outside assistance, principally from the United States, in their self-defense against Nicaragua's aggression,' "²⁰⁶ to which the Court replied that "[n]o indication has however been given of the dates on which such requests for assistance were made."²⁰⁷ The Court further said that Secretary of State Shultz's affidavit—asserting the exercise of the "inherent right of self-defense"—"makes no express mention of any request for assistance by the three States named";²⁰⁸ this was held to be significant in view of the Court's later statement that "[i]t is also evident that if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect."²⁰⁹

¹⁹⁹ Judgment, 1986 ICJ REP. at 46, para. 76.

²⁰⁰ *Id.* at 50, para. 85.

²⁰¹ *Id.* at 54, para. 93.

²⁰² *Id.* at 62, para. 109.

²⁰³ *Id.* at 62, para. 110.

²⁰⁴ *Id.* at 139, para. 277.

²⁰⁵ "Since the evidence linking the 'Freedom Fighter's Manual' to the CIA is no more than newspaper reports the Court will not treat its publication as an act imputable to the United States Government for the purposes of the present case." *Id.* at 65-66, para. 117 (emphasis added).

²⁰⁶ *Id.* at 87, para. 165 (emphasis added).

²⁰⁷ *Id.* (emphasis added).

²⁰⁸ *Id.* at 88, para. 165 (emphasis added). But see Dissenting Opinion of Judge Schwebel, *id.* at 323, para. 134 ("[the Court] failed to invite El Salvador to transmit evidence in support of its official claim to the Court that it had made such requests years earlier" (emphasis added)).

²⁰⁹ *Id.* at 120, para. 232. The Court then stated:

Thus in the present instance, the Court is entitled to take account . . . of the actual conduct . . . at the relevant time, as indicative of a belief by the State in question that it was the victim of an armed attack by Nicaragua, and of the making of a request by the victim State to the United States for help in the exercise of collective self-defence.

Finally, the Court went so far as to observe that President Reagan's executive order of May 1, 1985 ("which contained a finding that 'the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States' ")²¹⁰ did not exculpate the United States from responsibility under the 1956 Treaty of Friendship, Commerce and Navigation because it was wholly unsupported by evidence:

Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to "essential security interests" in May 1985, when those policies had been consistent, and consistently criticized by the United States, for four years previously, the Court is unable to find that the embargo was "necessary" to protect those interests.²¹¹

In view of the difficulties confronting it in the *Nicaragua* case, the Court also made explicit that caution must be exercised in the use of evidence that has not been fully tested by the adversary method or that, for one or another reason, is hearsay, conclusory or closer to the expression of opinion than to being a manifestation of a fact:

The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence. An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact; *it may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself*. Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight . . .²¹²

Thus, the Court characterized the testimony (in affidavit) of Mr. Chamorro as "probably strictly hearsay";²¹³ and, as to that portion of the oral testimony of Mr. MacMichael relating to the period "after he left the CIA and ceased to have access to intelligence material," the Court stated that "it can attach little weight to statements of opinion of this kind."²¹⁴

Id. (emphasis added). And:

The Court has seen no evidence that the conduct of those States was consistent with such a situation . . . [T]he representative of El Salvador before the United Nations Security Council . . . *refrained from stating* that El Salvador had been subjected to armed attack, and *made no mention of the right of collective self-defence* which it had supposedly asked the United States to exercise.

Id. at 120-21, para. 233 (emphasis added). See also *id.* at 119-20, para. 231.

²¹⁰ *Id.* at 70, para. 125.

²¹¹ *Id.* at 141, para. 282.

²¹² *Id.* at 42, para. 68 (emphasis added).

²¹³ *Id.* at 50, para. 84: "It is not however clear what the source of [his] information was; since there is no suggestion that he participated in the operation . . . his evidence is *probably strictly hearsay*, and at the date of his affidavit, the same allegations had been published in the press" (emphasis added).

²¹⁴ *Id.* at 82, para. 149.

Special Problems

"Ongoing" or "Fluid" Situations. Finally, there has been much discussion of late about what has been termed "ongoing" or "fluid" factual situations, also involving "armed conflict." The assertion is made that these are inherently "unsuitable for judicial determination," and that the evidence produced in connection with them is intrinsically unmanageable or inappropriate for the Court's consideration.²¹⁵ The question seems to boil down to the proposition that fluid or ongoing situations are unsuitable for adjudication since their factual matrix is fluid and constantly changing.²¹⁶ The Court in its judgment on jurisdiction and admissibility in the *Nicaragua* case responded to this point in part, in terms of the preponderance of the actual evidence and the burden of proof.²¹⁷ The Court stated:

[A]ny judgment on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts, and are regarded by the Court as sound in law. A situation of armed conflict is not the only one in which evidence of fact may be difficult to come by, and the Court has in the past recognized and made allowance for this (*Corfu Channel, I.C.J. Reports 1949*, p. 18; *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 10, para. 13).²¹⁸

Ultimately, however, it is the litigant seeking to establish a fact that bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not

²¹⁵ The Department Statement and supporting Observations on the Judgment on Jurisdiction and Admissibility in the *Nicaragua* case in substance repeated this argument, and it has ever since occupied a key position in the views of those who disagree with that Judgment. See Department Statement, *supra* note 11, and "Observations," reprinted in 24 ILM 246, 246-48 and 262-63 (1985).

²¹⁶ Stripping away the argument concerning armed conflict, the United States Counter-Memorial framed the argument precisely in the first phase of the *Nicaragua* case:

The pattern of facts necessary to the achievement of a legal conclusion . . . is incapable of judicial ascertainment through the technical and formal procedures and evidentiary standards applicable to proofs at law.

. . . In addition, for the legal significance of such "facts" to be determined—in other words, for them to serve as the basis for a judicial determination of the respective rights and duties of the parties to an alleged armed conflict—a sufficiently coherent and legally static pattern of facts must be found to exist. The validity and applicability of any legal conclusion extends only as far as its factual predicate; rights and duties can be determined only with reference to facts proven to exist at a point in time that is either contemporaneous with or anterior to the judgment. Such a determination can therefore have no necessary application with respect to facts that may develop subsequently; the principle of *res judicata* is inherently retrospective. Hence the judicial process is unsuited to dealing with situations that are by their nature exceptionally fluid.

Counter-Memorial Submitted by the United States of America (The Questions of the Jurisdiction of the Court to Entertain the Dispute and of the Admissibility of Nicaragua's Application) 223-24, paras. 523-24 (Aug. 17, 1984) (emphasis added).

²¹⁷ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392, 436-38, paras. 99-101 (Judgment of Nov. 26).

²¹⁸ *Id.* at 437, para. 101.

to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof.²¹⁹

Ever since the arguments on admissibility in the jurisdictional phase of the *Nicaragua* case, the United States has also laid great stress on the proposition that the Court was never intended to handle matters involving "ongoing armed conflict." In view particularly of the requirement of Article 53 that the applicant's case be well founded in law, the Court in the *Nicaragua* case went out of its way to reassure itself that the case as presented to it by the end of the oral proceedings was not nonjusticiable on the ground that it related to an "ongoing armed conflict"; the Court held that the factual issues and legal conclusions to be drawn did not "necessarily involve [the Court] in any evaluation of military considerations."²²⁰

The Court also reverted to the question of the "ongoing" nature of the conflict—a characteristic, it had been urged by the United States, that would work to defeat any judicial attempt at resolving it. At the outset of the 115 paragraphs of the opinion devoted to factual questions, the Court stated quite bluntly that "[o]ne of the Court's chief difficulties in the present case has been the determination of the facts relevant to the dispute."²²¹ The Court added that "[a] further aspect of this case is that the conflict to which it relates has continued and is continuing," and concluded relatively simply that "the facts on which its Judgment is based should be those occurring up to the close of the oral proceedings on the merits of the case."²²² The Court did not engage in any analytic study of the dispute as one that was continuing (and must continue to continue), as opposed to past; rather, it based its resolution of this question on a rule of reason that, in effect, fixed the facts as at a given time and thus converted a continuing or fluid factual situation into one crystallized *ratione temporis* as at the end of the oral proceedings.²²³

It should also be noted that the basic premise underlying the institution of interim measures of protection (upon which the United States relied without hesitation in the *Hostages* case)²²⁴ is that it was surely intended to forestall current conflicts of interests by protecting against actions that might prejudice "the respective rights of either party" within the meaning of Article 41.²²⁵ As Judge Schwebel stated in his dissenting opinion: "The Statute of

²¹⁹ *Id.*

²²⁰ *Nicaragua Merits*, 1986 ICJ REP. at 28, para. 35.

²²¹ *Id.* at 38, para. 57.

²²² *Id.* at 39, para. 58.

²²³ See Dissenting Opinion of Judge Schwebel, *id.* at 318 and 324, paras. 124 and 140 (citing *Nuclear Tests*, 1974 ICJ REP. at 263–65, for the proposition that the Court should have dealt with fact developments subsequent to the closure of the oral proceedings); is there not a distinction, however, between subsequent indications of mootness of the dispute, as in *Nuclear Tests*, as opposed to other developments in the dispute, as in *Nicaragua*?

²²⁴ See Art. 41 of the Statute and Art. 73 of the Rules, *supra* note 35. See also the U.S. request for the indication of provisional measures at the outset of the *Hostages* case on Nov. 29, 1979, and the Order of the Court granting such provisional measures only a fortnight later. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Provisional Measures, 1979 ICJ REP. 7 (Order of Dec. 15).

²²⁵ See generally J. ELKIND, *INTERIM PROTECTION—A FUNCTIONAL APPROACH* (1981), who writes: "The *Hostages Case* also underlines the nexus between desperation and urgency. It may

the Court rightly contemplates that the Court may deal with cases of an 'ongoing' nature; if it did not, the provisions of the Statute for [provisional measures] . . . would not make sense."²²⁶ Of course, where two states are in present conflict, there is always a greater possibility of a fundamental change in the situation; the Court's position is that it would deal with such a circumstance in the appropriate manner, but without ruling it out as non-justiciable *in limine* on the basis that it might shortly change or be altered.²²⁷

Irregular and Illegal Evidence. One of the key problems presented by non-appearance (or nonparticipation, which is for these purposes functionally the same) is the paradox that evidence or near-evidence is taken into account by the Court that it might have ignored in a normal case, on the ground that the Court is obliged under Article 53 to satisfy itself that the claim of the applicant state is "well founded in fact as well as in law." In the course of attempting to determine the "well-foundedness" of factual assertions, the Court must necessarily make particular and deliberate efforts to consider any factual elements accessible to it even if, in a normal setting, such evidence would have been unacceptable (if not out of order) as being inconsistent with the Court's own rules.²²⁸

The perfect example of this paradox²²⁹ is where the nonappearing or disappearing party causes evidentiary material to be laid before the judges in an irregular manner, such as by using the mails, or delivering a document or white paper to the Registry, as indeed happened in the *Nicaragua* case

be necessary to act urgently to prevent an irreparable injury. It is necessary to act urgently to suppress an unendurable situation." *Id.* at 258. What could be more indicative of a "current" or "ongoing" or "fluid" situation than one in which interim measures of protection are sought and justifiably indicated?

²²⁶ 1986 ICJ REP. at 294, para. 71 (Schwebel, J., dissenting).

²²⁷ To paraphrase paragraph 101 of the Court's Judgment on Jurisdiction and Admissibility in the *Nicaragua* case, 1984 ICJ REP. at 437.

²²⁸ Thus, Judges Oda and Schwebel both felt that the Court had gone unnecessarily far in finding facts in the *Nicaragua* case and that Article 53 did not require it to go to such lengths. See Dissenting Opinion of Judge Oda, 1986 ICJ REP. at 244-45, paras. 67-69, especially at 245, para. 69: "The Court should therefore have been wary of over-facile 'satisfaction' as to the facts, and perhaps should not have ventured to deliver a Judgment on the basis of such unreliable sources of evidence." See also Dissenting Opinion of Judge Schwebel, 1986 ICJ REP. at 316-20, paras. 116-27.

²²⁹ The Court stated the paradox as follows:

While these are the guiding principles, the experience of previous cases in which one party has decided not to appear shows that something more is involved. Though formally absent from the proceedings, the party in question frequently submits to the Court letters and documents, in ways and by means not contemplated by the Rules. The Court has thus to strike a balance. On the one hand, it is valuable for the Court to know the views of both parties in whatever form those views may have been expressed. . . . On the other hand, the Court has to emphasize that the equality of the parties to the dispute must remain the basic principle for the Court. The intention of Article 53 was that in a case of non-appearance neither party should be placed at a disadvantage; therefore the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage.

1986 ICJ REP. at 25-26, para. 31.

with a State Department publication entitled *Revolution Beyond our Borders, Sandinista Intervention in Central America*.²³⁰ Such documents are nevertheless taken into account, one way or another, by the Court: "The Court however considers that, in view of the special circumstances of this case, it may, within limits, make use of information in such a publication."²³¹

The effect of the "illegal" provenance of evidence is also of interest. The Court in the *Corfu Channel* case was confronted with what it determined to be a violation of international law by the United Kingdom: "Operation Retail," a minesweeping operation undertaken in Albanian territorial waters without Albania's consent.²³² Yet evidence resulting from that operation was taken into account by the Court. While finding that the United Kingdom had not acted in accordance with international law as far as its incursive minesweep was concerned, the Court avoided considering specifically that such evidence would be "inadmissible" under some theory akin to the exclusion of evidence on constitutional grounds in U.S. municipal law, and permitted its use.²³³

The likely result in the future, therefore, is that—without specifically ruling on the matter—the Court will consider any such evidence on its own footing and weigh it accordingly, but will not exclude it from consideration on the ground of alleged "illegality" alone.²³⁴

CONCLUSIONS

IN GENERAL

This general review of the practice of the Court in matters of evidence and proof suggests some general conclusions about its powers and experience.

²³⁰ *Id.* at 44, para. 73. The oral proceedings had only commenced on the preceding day, Sept. 12; the publication was circulated later, on Nov. 6, 1985, as an official document of the United Nations. *Id.*

²³¹ *Id.* Judge Schwebel, in his dissenting opinion, stated that "the practice of the Court demonstrates repeated reliance on irregular communications from States parties to a case and reliance even on documents and statements of a non-appearing State which are not addressed to the Court and which are published after the closure of oral hearings." *Id.* at 318, para. 123. Judge Schwebel believed, however, that inadequate account had been taken of this particular document. *Id.* at 318–20, paras. 122–27 (especially para. 122 at 318); see the Dissenting Opinion of Judge Oda, *id.* at 240–45, paras. 61–69, especially para. 62 at 241–43. (For a sophisticated discussion of this problem, written before the Judgment in *Nicaragua Merits*, see H. THIRLWAY, *supra* note 151, at 143–51.)

²³² Indeed, the Court answered the second question of the special agreement in the case *unanimously*: Great Britain had violated Albanian sovereignty in connection with the evidence-gathering incursion represented by "Operation Retail," but *not* in connection with the initial voyage of the destroyers that had hit the mines. 1949 ICJ REP. at 32–36.

²³³ *Id.* at 13–15. The illegality issue was not raised specifically, in an exclusionary sense, but only in relation to the second question presented by the special agreement. For interesting recent discussion concerning the use or nonuse of "tainted" evidence that has been collected or obtained by processes that constitute violations of international law, and whether the Court is under any duty to exclude such evidence from its deliberations, see Thirlway, *Dilemma or Chimera?—Admissibility of Illegally Obtained Evidence in International Adjudication*, 78 AJIL 622, 632–33 (1984) (on *Corfu Channel*); and Reisman & Freedman, *The Plaintiff's Dilemma: Illegally Obtained Evidence and Inadmissibility in International Adjudication*, 76 AJIL 737, 747 (1982).

²³⁴ See generally Thirlway, *supra* note 233.

In only a few instances since 1922 has the Court heard live testimony; yet the quantity—and also the variety—of evidence that states are now accustomed to laying before it during the written and oral proceedings could do a Federal Rules discovery procedure proud. Evidence has taken the form of inspection on the spot, whether by the judges themselves or by Court-appointed experts. It has been adduced in court by the live testimony of witnesses and the live expertise of experts; cross-examination has accompanied direct testimony. Documents of all shapes, sizes, antiquity and provenance have been introduced. Maps ranging from antique charts to modern computerized block-diagrams have accompanied three-dimensional models as “illustrative” material or “tools of pleading.” Films have been shown.²³⁵

A brief *tour d'horizon* can illustrate quite readily the wide range of material that has been embraced and disposed of by the Court in the exercise of its duty to determine facts that “would constitute the breach of an international obligation.”²³⁶ Among other things, the Court’s appreciation of facts giving rise to the responsibility of the parties before it has ranged from its appreciation of details of mining operations in Upper Silesia to accounting techniques for valuing going concerns and the potential effect of cartel operations in the phosphates industry.²³⁷ It has been concerned with diplomatic history and the administrative details of colonial regimes,²³⁸ the administration of phosphates concessions²³⁹ and the details of river transportation on the Congo.²⁴⁰ It has occupied itself in considerable detail with determining the validity of local and municipal laws and regulations regarding rights of minorities (and related rights) guaranteed under the Peace Treaties.²⁴¹

It has considered claims of great antiquity, necessitating historical review

²³⁵ See *Temple of Preah Vihear*, 1962 ICJ REP. at 9; and *Tunisia/Libya*, 1982 ICJ REP. at 25. On the *Gulf of Maine* case, see text at note 132 *supra*.

²³⁶ To quote Article 36, paragraph 2(c) of the Statute of the Court.

²³⁷ *Certain German Interests in Polish Upper Silesia and the Factory at Chorzów* (Ger. v. Pol.) (Jurisdiction), 1927 PCIJ, ser. A, No. 9 (Judgment of July 26); (Interim Protection), 1927 PCIJ, ser. A, No. 12 (Order of Nov. 21); (Interpretation), 1927 PCIJ, ser. A, No. 13 (Judgment of Dec. 16); (Indemnity), 1928 PCIJ, ser. A, No. 17 (Judgment of Sept. 13); (Expert Enquiry), 1928 PCIJ, ser. A, No. 17 (Order of Sept. 13).

²³⁸ *Nationality Decrees*, *supra* note 72; *U.S. Nationals in Morocco*, *supra* note 90; the *Temple* case, *supra* note 80; *Tunisia/Libya*, *supra* note 26.

²³⁹ *Phosphates in Morocco* (Italy v. Fr.) (Preliminary Objections), 1938 PCIJ, ser. A/B, No. 74 (Judgment of June 14).

²⁴⁰ *Oscar Chinn*, *supra* note 103.

²⁴¹ *German Settlers in Poland*, 1923 PCIJ, ser. B, No. 6 (Advisory Opinion of Sept. 10); *Acquisition of Polish Nationality*, 1923 PCIJ, ser. B, No. 7 (Advisory Opinion of Sept. 15); *Polish Postal Service in Danzig*, 1925 PCIJ, ser. B, No. 11 (Advisory Opinion of May 16); *Rights of Minorities in Upper Silesia (Minority Schools)* (Ger. v. Pol.), 1928 PCIJ, ser. A, No. 15 (Judgment of Apr. 26); *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels*, 1931 PCIJ, ser. A/B, No. 43 (Advisory Opinion of Dec. 11); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932 PCIJ, ser. A/B, No. 44 (Advisory Opinion of Feb. 4); *Polish Agrarian Reform and German Minority* (Ger. v. Pol.) (Interim Protection), 1933 PCIJ, ser. A/B, No. 58 (Order of July 29); *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, 1935 PCIJ, ser. A/B, No. 65 (Advisory Opinion of Dec. 4).

of many centuries of conduct and state claims.²⁴² It has dealt with territorial claims of considerable cartographic detail.²⁴³ It has been occupied with complex questions of concessionary rights and public contracts in mandated and other territories.²⁴⁴ It has been concerned with complex questions of geology, fishing practices, ecology, petroleum resources and even plate tectonics, and has summarized abstruse geomorphological material with accuracy and care.²⁴⁵ The Court has also dealt in detail with the intricacies of canal engineering.²⁴⁶

The Court has resolved complexities of corporate finance and public indebtedness, exchange controls and companies law.²⁴⁷ It would doubtless have been prepared to deal with facts relating to hostile aerial incidents resulting in loss of life, and to discriminatory racial policies applied in mandated territories, had jurisdictional concerns not intervened.²⁴⁸ It has ruled in situations involving asylum of a political refugee,²⁴⁹ the expropriation and naturalization of a former German national²⁵⁰ and the lengthy imprisonment

²⁴² *Eastern Greenland*, *supra* note 80; *Peter Pázmány University Case* [Appeal from a Judgment of the Czechoslovak-Hungarian Mixed Arbitral Tribunal (*Peter Pázmány Univ. v. Czechoslovakia*)] (Czech. v. Hung.), 1933 PCIJ, ser. A/B, No. 61 (Judgment of Dec. 15); *Minquiers and Ecrehos*, *supra* note 80; the *Temple case*, *supra* note 80.

²⁴³ *Jaworzina, Saint-Naoum, Frontier Land and the Temple case*, all *supra* note 80.

²⁴⁴ *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.) (Jurisdiction), 1924 PCIJ, ser. A, No. 2 (Judgment of Aug. 30); *Mavrommatis Jerusalem Concessions* (Greece v. Gr. Brit.) (Merits), 1925 PCIJ, ser. A, No. 5 (Judgment of Mar. 26); *Readaptation of the Mavrommatis Jerusalem Concessions* (Jurisdiction), 1927 PCIJ, ser. A, No. 11 (Judgment of Oct. 10); *Oscar Chinn*, *supra* note 103; *Lighthouses Case between France and Greece* (Fr./Greece), 1934 PCIJ, ser. A/B, No. 62 (Judgment of Mar. 17); *Lighthouses in Crete and Samos* (Fr./Greece), 1937 PCIJ, ser. A/B, No. 71 (Judgment of Oct. 8); *Phosphates in Morocco*, *supra* note 239; *Panevezys-Saldutiskis Railway Case* (Estonia v. Lithuania) (Merits), 1939 PCIJ, ser. A/B, No. 76 (Judgment of Feb. 28); *Anglo-Iranian Oil Co. (UK v. Iran)*, Interim Protection, 1951 ICJ REP. 89 (Order of July 5); and *Preliminary Objections*, 1952 ICJ REP. 93 (Judgment of July 22).

²⁴⁵ *Fisheries*, *supra* note 87; *Fisheries Jurisdiction*, *supra* note 127; *North Sea Continental Shelf*, *supra* note 129; *Aegean Sea Continental Shelf* (Greece v. Turk.), Interim Protection, 1976 ICJ REP. 3 (Order of Sept. 11); and 1978 ICJ REP. 3 (Judgment of Dec. 19); *Tunisia / Libya*, *supra* note 26; *Gulf of Maine*, *supra* note 43; *Libya / Malta*, *supra* note 43.

²⁴⁶ *Meuse*, *supra* note 49.

²⁴⁷ *Brazilian Loans* (Braz./Fr.), 1929 PCIJ, ser. A, No. 21 (Judgment of July 12); *Serbian Loans* (Fr./Serb-Croat-Slov. State), 1929 PCIJ, ser. A, No. 20 (Judgment of July 12); *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., UK, U.S.), Preliminary Question, 1954 ICJ REP. 19 (Judgment of June 15); *Certain Norwegian Loans* (Fr. v. Nor.), 1957 ICJ REP. 9 (Judgment of July 6); *Interhandel* (Switz. v. U.S.) (Preliminary Objections), 1959 ICJ REP. 6 (Judgment of Mar. 21); *Barcelona Traction (New Application)*, *supra* note 91.

²⁴⁸ See the various *Aerial Incident* cases of the 1950s: *Aerial Incident of 7 October 1952* (U.S. v. USSR), 1956 ICJ REP. 9 (Order of Mar. 14); *Aerial Incident of 10 March 1953* (U.S. v. Czech.), 1956 ICJ REP. 6 (Order of Mar. 14); *Aerial Incident of 4 September 1954* (U.S. v. USSR), 1958 ICJ REP. 158 (Order of Dec. 9); *Aerial Incident of 27 July 1955* (Isr. v. Bulg.), 1959 ICJ REP. 127 (Judgment of May 26); *Aerial Incident of 7 November 1954* (U.S. v. USSR), 1959 ICJ REP. 276 (Order of Oct. 7); *Aerial Incident of 27 July 1955* (UK v. Bulg.), 1960 ICJ REP. 264 (Order of Aug. 3); *Aerial Incident of 27 July 1955* (U.S. v. Bulg.), 1960 ICJ REP. 146 (Order of May 30); *South West Africa Cases (Second Phase)*, *supra* note 12.

²⁴⁹ *Asylum* (Colom./Peru), 1950 ICJ REP. 266 (Judgment of Nov. 20); *Request for interpretation of the Judgment of November 20th, 1950, in the asylum case*, 1950 ICJ REP. 395 (Judgment of Nov. 27).

²⁵⁰ *Nottebohm* (Lichtenstein v. Guat.), Preliminary Objections, 1953 ICJ REP. 111 (Judgment of Nov. 18).

of hostages by a revolutionary government.²⁵¹ It has determined a state's responsibility for mining damage to war vessels in the absence of direct evidence and has resolved detailed factual questions concerning the nature of the mines, the incident itself and the manner of conducting naval operations.²⁵² Most recently, of course, it has dealt with facts relating to civil insurrection and belligerency, including the mining of harbors, the conduct of overflights, attacks on ports and shore installations, the preparation of field manuals encouraging selective assassinations, economic warfare and—in general—the logistical, political and financial support by one state of elements of armed insurrection within the territory of another. In this latter context, it has considered facts relating to trans-border arms supplies and personnel movements, the existence of "armed attacks," and the necessity and proportionality of actions taken in response to them.²⁵³

However, the natural subject matter of the types of cases that have been presented before the Court—and the proof of the type of facts that constitute violations or breaches of international obligations—does not normally require detailed investigation into, or resolution of, difficult evidentiary questions. Evidence has generally been presented in documentary form or in the course of assertions with documentary support during oral and written proceedings. Neither Court has dealt very extensively with witnesses or experts, although some cases have indeed involved testimony and expertise or the use of Court-appointed experts. Moreover, its Statute and Rules confer broad, flexible and far-reaching powers on the Court, which in several instances have been exercised.²⁵⁴ There also is no a priori limitation on the ability of the Court to make difficult factual determinations; in some instances, its precise and delicate appreciation of complex facts is quite striking.²⁵⁵

The size of the Court, the nature of its international law subject matter and the high degree of formality with which proceedings are conducted and arguments advanced before it, all explain why detailed evidentiary questions are most frequently resolved by documentary methods of proof involving a strict discipline of factual admission and retraction. In addition, the Court has resorted with increasing frequency and unusual force to a form of "international judicial notice," and has resolved matters in favor of complainant states in instances where only unfavorable inferences could be drawn because of nonappearance, refusal to permit discovery or failure to submit to documentary production.

SPECIFICALLY CONCERNING NICARAGUA

When one considers overall the various affirmative determinations of fact in the *Nicaragua* case, it is noticeable how few of them were decided by direct

²⁵¹ The *Iranian Hostages* case, *supra* note 54.

²⁵² *Corfu Channel, Merits*, *supra* note 10; *Compensation*, *supra* note 9.

²⁵³ *Nicaragua Merits*, *supra* note 1.

²⁵⁴ The *Meuse* case even involved a "view" by the Court itself. See text at note 49 *supra*.

²⁵⁵ See *Tunisia/Libya*, 1982 ICJ REP. at 54-58, paras. 62-68.

evidence of any kind.²⁵⁶ The first issue,²⁵⁷ relating to the mining of Nicaraguan ports and attacks on shore installations, was largely determined by recognizing uncontroverted news reports, and by making inferences about statements by U.S. public authorities constituting either admissions against the U.S. interest or failure to deny news stories on the subject.²⁵⁸ The second issue,²⁵⁹ that of the infringement of Nicaraguan airspace, was again determined by a combination of attribution and failure to deny.²⁶⁰ Joint military maneuvers with Honduras were confirmed as a "matter . . . of public knowledge."²⁶¹

Regarding the contra forces,²⁶² the Court found that they were supported by and dependent upon the United States, but were not so closely controlled by the United States as to become in effect agents of the U.S. Government, with fully imputable responsibility for their actions.²⁶³ Affirmative findings concerning this subject were largely supported by reports of official government acknowledgments and discussions of the contra forces.²⁶⁴ Publication of a manual was not attributable to the United States because its authorship was only indicated by press reports,²⁶⁵ but that of another was so attributable because of its public mention by a U.S. governmental body.²⁶⁶ The finding of the existence of the economic measures against Nicaragua was supported by official U.S. government statements.²⁶⁷

As to what would have been an affirmative defense of the United States (had the United States been present), governmental declarations and similar conclusory remarks were insufficient to establish facts,²⁶⁸ but direct testimony and indirect inferences drawn from that testimony, as well as close readings and negative inferences from statements by Nicaraguan officials, were used to find some trans-border supply of arms at certain periods, though not at other periods.²⁶⁹ Cross-border military incursions into Honduras and Costa Rica were found to have been attributable to Nicaragua by its failure specifically to deny accusations.²⁷⁰ No express request for aid was found to have been made.²⁷¹ The views of the United States concerning the failure of the Nicaraguan regime to live up to its stated intentions of 1979 were determined by public announcement and publication by officials.²⁷²

This quick overview of the factual findings made in the *Nicaragua* case suffices to show how substantially the Court relied upon indirect or inferential methods of proof, as well as on public knowledge supported by either gov-

²⁵⁶ Following the schema of the *Nicaragua* decision, 1986 ICJ REP. at 38-92, paras. 57-171.

²⁵⁷ *Id.* at 146-48, para. 292(4), (6), (7) and (8) [*dispositif*].

²⁵⁸ *Id.* at 45-51, paras. 75-86.

²⁵⁹ *Id.* at 147, para. 292(5) [*dispositif*].

²⁶⁰ *Id.* at 51-53, paras. 87-91.

²⁶¹ *Id.* at 53, para. 92.

²⁶² *Id.* at 146, para. 292(3) [*dispositif*].

²⁶³ *Id.* at 53-65, paras. 92-116.

²⁶⁴ *Id.* at 61, para. 107 ("The legislative and executive bodies of the respondent State have moreover, subsequent to the controversy which has been sparked off in the United States, openly admitted the nature, volume and frequency of this support").

²⁶⁵ *Id.* at 65-66, para. 117.

²⁶⁶ *Id.* at 66-69, paras. 118-22.

²⁶⁷ *Id.* at 69-70, paras. 123-25.

²⁶⁸ *Id.* at 71-72, para. 128.

²⁶⁹ *Id.* at 70-86, paras. 126-60.

²⁷⁰ *Id.* at 86-87, paras. 161-64.

²⁷¹ *Id.* at 87-88, paras. 165-66.

²⁷² *Id.* at 87-92, paras. 165-71.

ernmental publications or notoriety or press reports that had not been corrected by officials. It must be acknowledged, however, that Judge Schwebel in his dissent stressed his opinion that the Court's findings of fact—even if largely employing these indirect techniques—were skewed in favor of Nicaragua against the United States,²⁷³ particularly in relation to the alleged armed attacks and intervention by Nicaragua against its neighbors.²⁷⁴ Judge Schwebel attributed this shortcoming to the way the Court had selected and evaluated news stories and other reports, and to what he viewed as the failure of the Court to take into account in an appropriate manner all of the available material (including particularly material filed with the Court on behalf of the United States)²⁷⁵ and to use its authority to find facts on its own (including possible use of a commission).²⁷⁶

Nevertheless, the Court's use in *Nicaragua* of indirect and inferential techniques clearly owed much to the one-sided nature of the proceedings being conducted under Article 53. Had the United States been present in court, this use would have been far less prominent. Yet since these techniques have also long been employed by the Court to winnow through the vast quantities of documentary assertion and evidentiary pleading to which it is normally subjected in bilateral litigations, they are therefore not wholly new in the *Nicaragua* situation. In the *Hostages* case, the most dramatic previous example of nonappearance and judicial response under Article 53, the Court made liberal and uncontroverted use of public knowledge and evidence taken as fact by the exercise of a form of judicial notice.²⁷⁷ What is so striking and novel about the *Nicaragua* case is the cumulation of their multiple use and the overall breadth and volume of the Court's findings on the basis of these methods in an unprecedentedly strong decision under Article 53.

THE FUTURE

What is likely to be the overall effect of the *Nicaragua* case on the future activity of the Court, and specifically upon its ability to deal with matters of evidence? Although the Court has broad flexibility and wide powers in matters relating to evidence, it has not yet used them to their full potential, any more than the Court itself has been used to its full potential. It did not fully use those powers in *Nicaragua*. The difficult Judgment just rendered in that case will in every likelihood engender a broad assault from legal circles sympathetic to the position of the United States, to the effect that the Court has seriously injured itself, and that its future caseload and activity—certainly in respect of cases from the developed countries of the West—will suffer as a result.

²⁷³ See note 172 *supra*.

²⁷⁴ See, e.g., Dissenting Opinion of Judge Schwebel, 1986 ICJ REP. at 271-73, paras. 14-16; 279-80, paras. 31-32; and 295-96, para. 75.

²⁷⁵ *Id.* at 318-20, paras. 122-27; and 325-27, paras. 141-45.

²⁷⁶ *Id.* at 321-23, paras. 132-34; see also note 143 *supra* and accompanying text.

²⁷⁷ See *supra* note 188 and accompanying text.

Is this likely to be true? Some brief observations and conclusions come to mind:

(1) The Court—at this writing—has seldom been busier. The Chamber in the *Mali/Burkina Faso* boundary dispute has just rendered its Judgment.²⁷⁸ The United States and Italy have agreed to submit the *Raytheon* case to a Chamber of the Court, although the terms of reference to the Court have not yet been made public.²⁷⁹ The damages or “reparations” phase of the *Nicaragua* case is still to take place.²⁸⁰ A request for an advisory opinion is pending.²⁸¹

Two fresh contentious cases have been filed in the Court since the decision in *Nicaragua*.²⁸² Both were filed by Nicaragua as applicant; each related to fundamentally the same issues as had already been determined in the Judgment in *Nicaragua v. United States*.²⁸³ To the extent either proceeding reaches the merits, there will be ample opportunity for the Court again to handle matters of factual inquiry (save this time with the benefit of the participation of the respondent).

A third case, concerning the territorial and maritime boundary dispute between El Salvador and Honduras is also, at this writing, about to be filed (before a Chamber of the Court).²⁸⁴ In that case, substantial evidence may be expected, perhaps of a more traditional nature (geographic, cartographic,

²⁷⁸ Frontier Dispute (Burkina Faso/Mali) [Special Agreement of Sept. 16, 1983], 1984-1985 ICJ Y.B. 171; ICJ Communiqué No. 86/18, December 22, 1986 (Judgment of Dec. 22).

²⁷⁹ Statement of Oct. 7, 1985, reproduced in 24 ILM 1745 (1985).

²⁸⁰ See *Nicaragua Merits*, 1986 ICJ REP. at 142-43, paras. 283-85, especially para. 284; and 149, para. 292(15) [*dispositif*].

²⁸¹ Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal (*Yakimetz v. Secretary-General of the United Nations*). On Sept. 20, 1984, the Court received a request for an advisory opinion submitted by the Committee on Application for Review of Judgments of the Administrative Tribunal of the United Nations in respect of UNAT Judgment No. 333 of June 8, 1984. The committee had taken this step on Aug. 23, at the request of the interested parties, under Article 11 of the UNAT Statute. Written comments were submitted by the United States Government and by the Secretary-General, who also transmitted the comments of the individual who was the subject of the UNAT judgment. See Report of the International Court of Justice, 1 August 1985-31 July 1986, 41 UN GAOR Supp. (No. 4) at 18, UN Doc. A/41/4 (1986).

²⁸² See ICJ Communiqué No. 86/10, July 29, 1986, announcing the filing of two applications by Nicaragua on July 28, 1986, one against Costa Rica and one against Honduras, each entitled “Border and Transborder Armed Actions.” Both respondents have appointed agents; Honduras is expected to contest its case on jurisdictional grounds, and Costa Rica has reserved the right to present a counterclaim on the merits. See, respectively, ICJ Communiqué Nos. 86/11 and 86/12, Sept. 3, 1986.

²⁸³ It will be interesting—and most important—to note the extent to which (if at all) the Court’s application of the principles and rules of evidence developed in *Nicaragua v. United States* in 1986 will be applied, adapted or modified, or will in effect remain unused in these two subsequent cases, and also the extent to which (if at all) the Court will modify or alter its interpretation of the critical legal principles set forth in the original *Nicaragua* case.

²⁸⁴ El Salvador/Honduras Boundary Dispute, *Compromis* of May 24, 1986, registered with the UN Secretary-General on Oct. 7, 1986. The parties have agreed to notify the Court jointly before Dec. 31, 1986, following which an official announcement concerning the case will be made.

historical and documentary). Since the dispute is intended to be brought by special agreement, the Chamber is bound to reach the merits. Finally, observers expect several more continental shelf disputes to come before the Court (or Chambers of the Court) in the next several years; in matters of this sort, complex questions of evidentiary proof can still be anticipated.²⁸⁵

(2) Any lack of confidence by states in the Court's ability to handle evidence and facts would be serious indeed. This is particularly so because of the litigator's commonplace: that, in the long run, the factual matrix is always the most important part of any lawsuit. The present administration in Washington, and international lawyers sympathetic to its current problem of being at the receiving end of one of the strongest and most important cases ever decided by the Court,²⁸⁶ will doubtless soon be predicting, as a result of the *Nicaragua* case, that the same type of desuetude that the Court suffered following its 1965 decision in the *South West Africa Cases*²⁸⁷ will be repeated (at least as to the developed world). They will say that whereas a good part of the reaction 20 years ago was predicated on assertions that the Court was not sufficiently responsive to the "Third World"²⁸⁸ and had shown a bias to Western or "neocolonialist" values, the Court has now gone over—excessively—to the other side. Such criticism will probably take the form of assertions (to this writer wholly unfounded) that the Court was too responsive to the Third World, insensitive to the problems and tensions of the "real" world, and definitely biased in favor of "anti-Western" or Third World values. Such accusations would be unfortunate as well as unfair; they impugn the independence of the Court and are difficult to counter in purely analytic terms.

(3) It is still too early to tell what the overall reaction to the *Nicaragua* case of developed states (other than the United States) will be; but even if that reaction is supportive of the Court in general—as in the author's judgment it should be—the Court and its "clientele" will still inevitably develop in the direction of the Third World. This development will occur for affirmative rather than negative reasons: by a general increase in Court traffic by Third World states,²⁸⁹ reinforced perhaps by a largely valid perception that

²⁸⁵ See notes 129–135 *supra* and accompanying text.

²⁸⁶ Which could probably have been prevented had the United States taken the Court more seriously in 1984: "Before embarking on a Reagan doctrine," Thomas Franck has observed, "the United States should have taken care that its legality could not be tested in the World Court. . . . Failing to bring its legal strategy into line with its political strategy, the United States found itself inevitably on the losing end of a major law suit." T. FRANCK, *JUDGING THE WORLD COURT* 60 (1986); see also *id.* at 64.

²⁸⁷ See L. HENKIN, *HOW NATIONS BEHAVE* 187 (2d ed. 1979); M. KATZ, *THE RELEVANCE OF INTERNATIONAL ADJUDICATION* 103–44 (1968).

²⁸⁸ If, indeed, it is still constructive to characterize the majority of United Nations members by that term.

²⁸⁹ Which have played a surprisingly active role even in the past two decades, in spite of the slump following the *South West Africa* Judgment in 1966. See, for example, these cases (in addition to the *Nicaragua* series) involving Third World interests: Trial of Pakistani Prisoners of War (Pak. v. India), Interim Protection, 1973 ICJ REP. 328 (Order of July 13); and removal from list, *id.* at 347 (Order of Dec. 15); Western Sahara, 1975 ICJ REP. 12 (Advisory Opinion

the Court in *Nicaragua* attempted to break out of the mold of sterile positivism into which it had been cast 20 years ago in the *South West Africa Cases*, and made a strenuous effort to be objectively responsive to the perceived aspirations of the majority of member states in 1986.²⁹⁰ In the long run, demographic trends will probably also cause the overall business and preoccupations of the Court to shift substantially toward the Third World; the *Nicaragua* case and its likely aftermath may then have had a significant part in accelerating this trend. It may even prove to be a happy irony that many of the positive suggestions for reform of the Court that have been made over the years, and that are particularly surfacing again now in the aftermath of *Nicaragua*, will have been accomplished by indirection when they could not have been brought about directly: the Court is becoming increasingly busy with certain traditional and relatively limited disputes, brought in large part by special agreement, relating to smaller states of the Third World and involving the use of Chambers. It is hoped that fresh cases will continue to come to the Court, no matter what they involve, and no matter what their provenance. In spite of the unpopularity in some quarters of the *Nicaragua* decision, perhaps the Court's willpower and institutional courage and independence—which are certainly highlighted by that decision—will ultimately prove to be a more important attraction. The irony is that it may eventually become crystal clear that the Court has *not* been biased (as will have been urged by the United States) but has, in fact, been precisely the opposite.

(4) The Court will definitely have a variety of cases before it in the next several years that will deal further with questions of evidence and proof. Not the least of these will be the reparations phase of the *Nicaragua* case. Since much attention, and much of the inevitable criticism by the United States, will undoubtedly be addressed to the Court's handling of the complex evidence in the absence of the respondent,²⁹¹ the Court can be expected to deal with the reparations phase of *Nicaragua*, and the factual issues in the other cases recently brought before it, with the same "exacting care" that Judge Lauterpacht thought it had demonstrated in *Corfu Channel*.²⁹² It can be hoped, if not anticipated, that the Court will exercise an even higher

of Oct. 16); *Aegean Sea*, *supra* note 245; Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 ICJ REP. 73 (Advisory Opinion of Dec. 20); the *Iranian Hostages* case, *supra* note 54; Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application [Malta] for Permission to Intervene, 1981 ICJ REP. 3 (Judgment of Apr. 14); *Tunisia/Libya*, *supra* note 26; Continental Shelf (Libyan Arab Jamahiriya/Malta), Application [Italy] for Permission to Intervene, 1984 ICJ REP. 3 (Judgment of Mar. 21); *Libya/Malta*, *supra* note 43; *Application for Revision and Interpretation*, *supra* note 85; *Frontier Dispute*, *supra* note 278.

²⁹⁰ "In different respects and for different reasons, the Court was not [politically] responsive enough in the *South West Africa Cases* and in its *Certain Expenses* Advisory Opinion and probably was overly responsive in the *Namibia* Advisory Opinion." R. FALK, REVIVING THE WORLD COURT 23 (1986).

²⁹¹ Even states that may be highly sympathetic to the vigorous substantive holding in the case may not be prepared to face a similarly vigorous ruling of the Court on a matter closer to their own national interest.

²⁹² See text at note 61 *supra*.

degree of care in attacking factual issues than it has ever done before, if only as a result of the adverse criticism it will doubtless receive from those sympathetic to the U.S. position in the *Nicaragua* case.

(5) It also remains to be seen how well the Court can weather the institutional storm that is now about to break over implementation of the *Nicaragua* decision, including most importantly the conduct and results of the "subsequent phase of the proceedings" on reparations.²⁹³ Even if the Judgment in *Nicaragua* is perceived as being absolutely correct, and the position of the United States as absolutely wrong, the problem nevertheless remains. The attitude of the United States toward the subsequent phase of the proceedings will be critical: in particular, how it responds to its obligation to comply with any part of the Court's decision.²⁹⁴ The fear is that the case may effectively become transformed from *Nicaragua v. United States* into *United States v. International Court of Justice*.²⁹⁵

(6) Long-term stonewalling of the Court by the United States concerning the *Nicaragua* decision may well backfire. The vast majority of member states may become increasingly sympathetic to the Court, whether or not they actually agree with the substance of the *Nicaragua* decision, simply because by defying the Court over *Nicaragua*, the United States will be defying the Court in general; by necessary inference, it will then also be defying the

²⁹³ *Nicaragua Merits*, 1986 ICJ REP. at 142-43, paras. 283-85; and 149, para. 292(15) [*dispositif*]. Can it not be cogently argued that the United States, bound as it is by Article 94, paragraph 1 of the Charter, ought now to reenter the proceedings so as to mitigate damages? (The Court even suggested this eventuality: "while the United States has chosen not to appear or participate in the present phase of the proceedings, Article 53 of the Statute does not debar it from appearing to present its arguments on the question of reparation if it so wishes." 1986 ICJ REP. at 143, para. 284.) Does the Executive not have a duty to avoid, wherever possible, a heedless accumulation of liabilities under treaties and other international agreements? Is not a decision *not* to reenter the proceedings for the purpose of mitigating damages tantamount to a gamble, in effect, that the Judgment will be unenforceable at all costs, as well as an anticipatory repudiation of our solemn obligations under Article 94, paragraph 1 of the Charter (as distinguished from any subsequent enforcement action under Article 94, paragraph 2)? See Highet, *supra* note 13, at 1003.

²⁹⁴ See *Nicaragua Merits*, 1986 ICJ REP. at 23-24, para. 27; see also Rowles, "Secret Wars," *Self-Defense and the Charter—A Reply to Professor Moore*, 80 AJIL 568, 580-82 (1986); and Highet, *supra* note 13, at 1003. The problem is also raised collaterally by the possibility of *Nicaragua's* being successful in enforcement or *exequatur* actions in third-party state courts in efforts to obtain judgments to confirm and order execution of the Court's decision.

²⁹⁵ As a matter of historical contrast to the positions currently being adopted by the United States (see the Department Statement, *supra* note 11): in 1923 Secretary of State Charles Evans Hughes (later to become both a judge of the PCIJ from 1928 to 1930 and also Chief Justice of the Supreme Court of the United States) wrote a letter to Norway enclosing a U.S. Government check for the full amount of a more than \$12 million arbitral award of 1922 in favor of Norway, on behalf of Norwegian shipowners whose vessels had been appropriated by the United States during World War I. Actually, Secretary Hughes was highly critical of the award and refused to accept that its bases of decision were declaratory of international law or capable of creating precedents binding on the United States. The check was nevertheless delivered, as a "tangible proof of [the] desire [of the U.S. Government] to respect arbitral awards" and of its "devotion to the principle of arbitral settlements *even in the face of a decision proclaiming certain theories of law which it cannot accept*." 1 R. Int'l Arb. Awards 344 (emphasis added). This precept should not go unnoted at the present time.

entire organization of which the Court is the principal judicial organ.²⁹⁶ The United States is not likely to suffer too many immediately adverse consequences—although the possibility of third-party or collateral enforcement of the decision should not be dismissed lightly—but positive effects on the general attitude toward the Court held by a large majority of UN member states could well be accelerated.

(7) The “no-appearance technique” of litigation²⁹⁷ will be placed in a new, sharp and critical light. The *Nicaragua* case dramatizes the profound consequences and implications of the nonappearance (more properly, disappearance) of the United States, and any subsequent refusal by it to comply with the Judgment. This can become a life-threatening event for a fragile institution such as the Court. Yet this strategy may also backfire: the “no-appearance technique” of litigation may suffer a setback, once its absurdity and overall uselessness are correctly perceived. Likewise, overt defiance of the Court by a great power over a case won by a small one may prove to be an unattractive example—a disincentive—for other states. It is hard to complain with Goliath after he has been trounced by David.

(8) The destruction or weakening of the Court does not appear to be as sure a thing as its opponents are bound to announce. This writer hopes that precisely the opposite effect will be experienced. As was pointed out above, many of the classic anodynes for improving the Court’s functioning are now beginning to materialize one way or another, perhaps in reaction to *Nicaragua* and perhaps merely by coincidence.

In any event, the negative forces undermining the progressive development of international law—nonproduction, noncooperation and nonappearance—which, like Antaeus, might at first appear to be gaining renewed strength from both the 1985 withdrawal of the United States and the likely long-term response by the United States and others to the Court’s *Nicaragua* decision in 1986, will now be seen for what they are.

It is therefore not entirely vain naiveté to hope that some institutional good may come out of the extraordinarily difficult situation from which the Court is just now emerging. That hope may be expressed as a variant of Pascal’s wager: it is better to believe in the Court than not to believe in the Court, since, if the Court does emerge as an effective institution, one’s belief and conviction will have been vindicated; whereas, if the Court falls upon increasingly difficult times, then it will not matter much *what* one believed. The Court may well continue to have more to do—not less—as a result of *Nicaragua*. At least, it will certainly have more facts to determine and it will have to continue to “perform that task with exacting care.”²⁹⁸ It is hoped that its use and determination of facts and evidence will grow in strength and depth as a result of, and not in spite of, the *Nicaragua* decision of 1986, where much of the Court’s careful and painstaking work was rendered difficult beyond description by the absence of the respondent.

²⁹⁶ UN CHARTER art. 92.

²⁹⁷ See Fitzmaurice, *supra* note 151, at 105.

²⁹⁸ See text at note 61 *supra*.

THE ICJ AND COMPULSORY JURISDICTION: THE CASE FOR CLOSING THE CLAUSE

By Gary L. Scott and Craig L. Carr*

I. INTRODUCTION

The refusal of the United States to consider itself bound by the recent decision in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*,¹ coupled with the earlier termination of its adherence to Article 36(2) of the Statute of the International Court of Justice, has sparked a small storm of controversy and concern.² Part of this concern involves how the United States, presumably a law-abiding and law-respecting nation, could possibly bring itself to snub the International Court of Justice and, by extension, the ideal of international law.³ Another part of this concern involves the likely consequences of the United States move on the vitality of the Court as the focal institution of a slowly evolving system of international law. A less obvious concern, but arguably one of paramount importance, calls into question the wisdom of insisting that the ICJ retain its optional compulsory jurisdiction. It is this less obvious concern that we propose to discuss here.

Article 36(2), the so-called optional clause, was born amid controversy and has lived amid controversy; but for reasons to become clear shortly, we think it should be permitted to die in peace. Historically, the clause is the product of political compromise accompanying the establishment of the Permanent Court of International Justice.⁴ This compromise proved necessary when the lofty ideals of international law ran headlong into the well-entrenched political realities of the international arena. The suggestion that the PCIJ be accorded compulsory jurisdiction over international disputes was readily accepted by the less powerful states, which wished to imagine themselves legally equal to the world's powers. However, this suggestion

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¹ *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

² The United States withdrawal from ICJ jurisdiction under Article 36(2) of the Statute of the Court was deposited by Secretary of State George Shultz on Oct. 7, 1985, following U.S. refusal on Jan. 18, 1985 to participate in *Military and Paramilitary Activities in and against Nicaragua*. See Department Statement, DEP'T ST. BULL., No. 2096, March 1985, at 64, reprinted in 24 ILM 246 (1985).

³ For a somewhat different view of the U.S. action, see, e.g., W. Reisman, *Has the International Court Exceeded its Jurisdiction?*, 80 AJIL 128 (1986).

⁴ See, e.g., Lloyd, "A Springboard for the Future": A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice, 79 AJIL 28 (1985); S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 364-67 (1965).

was just as readily rejected by the more powerful states.⁵ While these states saw merit in the ideal of international law, and while western democracies in particular have historically evinced a commitment to lawfulness, at least in theory if not in practice, they saw little reason to forsake the political benefits of their obvious strategic advantage by accepting a more than fictional equality before the bar of international justice. The PCIJ Optional Clause seemed a natural and reasonable compromise to this impasse; states were left free to accept, accept with reservations, or reject the Court's compulsory jurisdiction.

Today, however, this compromise seems less natural and less reasonable than it once did. Of the roughly 160 states belonging to the United Nations, only 46 currently accept the Court's compulsory jurisdiction through the optional clause.⁶ Of these, slightly over half have accepted that jurisdiction without substantial reservation.⁷ Moreover, there has been virtually no movement toward increased acceptance of the optional clause. In the last 15 years, only three additional states have accepted the optional clause⁸ and four, including France and the United States, have either withdrawn their acceptance or permitted it to lapse.⁹ In short, there has been no discernible growth of commitment to the optional clause demonstrated by the members of the United Nations. The logic that brought the compromise about still seems firmly entrenched. Most states prefer not to accept a condition that might place them before the Court involuntarily.¹⁰ The less powerful states may still see some political advantage in accepting compulsory jurisdiction, thereby gaining a modicum of equality with other nations of the world, and the more powerful states still see some political advantage in avoiding the acceptance of genuine legal equality.¹¹

The question raised in these circumstances is whether the optional clause contributes to or detracts from the way the Court's efficacy is perceived by the nations of the world. Ultimately, any decision about the viability of the optional clause must be based upon a critical assessment of the way com-

⁵ Lloyd, *supra* note 4, at 35.

⁶ Declarations Recognizing as Compulsory the Jurisdiction of the Court, 1983-1984 ICJ Y.B. 57-91.

⁷ *Id.*

⁸ The three acceptances were: Barbados on Aug. 1, 1980, 1982-1983 ICJ Y.B. 58; Togo on Oct. 25, 1979, *id.* at 86; Costa Rica on Feb. 20, 1973, *id.* at 61.

⁹ Since 1971, France, the United States, and the Republic of China have revoked their acceptances of the optional clause. Turkey allowed its acceptance of May 23, 1967 to lapse on May 23, 1972. 1970-1971 ICJ Y.B. 71.

¹⁰ While we recognize that no state can be brought before the Court without its consent, this consent can be granted at any time through provisions in the optional clause or in dispute settlement clauses in treaties. This has the effect of allowing states to agree to litigate over a dispute before the dispute arises. It is well known that once a dispute has arisen, even those states with prior agreements to litigate may not really want to find themselves before the Court. Legal niceties aside, it makes sense to think that they are not there voluntarily.

¹¹ Interestingly, none of the states accepting the optional clause in recent years have been powerful states and two of the three recent acceptances have been by new states. During the same period, all withdrawals from the optional clause have been by either very powerful or reasonably powerful states. See 1983-1984 ICJ Y.B. at 57-91.

pulsory jurisdiction affects the evolving efficacy of the Court as well as an emerging commitment to international law. Its defenders insist that the clause is necessary in order to approximate something like the rule of law in the international arena.¹² The presence of the clause putatively makes the Court more nearly resemble a "court of law" as this notion is understood within domestic legal systems. Further, these defenders claim that acceptance of the clause offers civil states an opportunity to declare to the world that they are willing to behave lawfully and accept principled solutions to international conflict.¹³ Finally, the continued existence of the clause is presumed to be a necessary condition for the evolutionary process through which, it is hoped, international law will supplant war and violence as the principal means used by states to resolve their disagreements.¹⁴

For the most part, these are thin reeds upon which to build a case for the optional clause. Acceptance of the clause may permit some political posturing by those states hoping to present an image of civility to the world, but this does not mean that states accepting the clause, at least in principle, will consider themselves bound to live up to their ideals in practice. Nor is it necessarily proper to build an image of an international legal system by analogy with domestic legal systems. Reproducing the machinery and operational style of domestic legal systems is no guarantee that it is possible to reproduce the same commitment to the rule of law that one finds within states boasting successful legal systems. The presumption that the optional clause is necessary for the evolving efficacy of the ICJ, however—if valid—is a compelling reason for retaining the clause. It remains to be seen whether anything can be said in favor of this presumption and also to examine what can be said against it. The optional clause has now been in place long enough, and the ICJ has disposed of enough litigation, for an analysis of the success of the clause, as well as an assessment of its value as a contributor to the Court's efficacy, to be attempted.

II. LITIGATION INVOLVING COMPULSORY JURISDICTION

Let us begin with a review of the use of the optional clause in litigation during the ICJ's 40-year history. This seems to be the most tangible and therefore most dependable method for analyzing the Court's compulsory jurisdiction. While it can be claimed that the mere presence of optional compulsory jurisdiction contributes to the avoidance of disputes, or to their early settlement, difficulties of verification put such claims in the realm of conjecture. We are left, then, with litigation as the most effective indicator

¹² See, e.g., Owada, *What Future for the International Court of Justice?*, 65 ASIL PROC. 268 (1971); Gross, *Review of the Role of the International Court of Justice*, 66 AJIL 479 (1972); D'Amato, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AJIL 385 (1985).

¹³ D'Amato, *supra* note 12, at 386.

¹⁴ Onuf, *International Legal Order as an Idea*, 73 AJIL 244 (1979); D'Amato, *The United States Should Accept, by a New Declaration, the General Compulsory Jurisdiction of the World Court*, 80 AJIL 331 (1986).

of the record of the optional clause. Though the character of the international legal system and of the Court itself has changed over time, a case analysis should nonetheless contribute to a clearer perspective on the value of the clause to the viability of the ICJ as a dispute settlement mechanism.

Early use of the ICJ's compulsory jurisdiction under Article 36(2) of the Statute yields little for definitive analysis. This is true partly because there are relatively few cases and partly because the results of the cases are so mixed. Thus, a small universe is divided into a rather wide range of possible outcomes. Nevertheless, we can still draw some conclusions about the significance of the role the optional clause played in the development of the Court's compulsory jurisdiction. We think there is little evidence to suggest that most of the cases brought under Article 36(2) would have proceeded any differently had the optional clause not come into play.

The first use made of the optional clause to bring a case before the Court, the Anglo-Norwegian *Fisheries* case of 1951,¹⁵ seemingly set off a spate of litigious behavior during the decade from 1951 to 1961. During this period, the Court heard 16 cases, more than in any other decade in its existence.¹⁶ This must have seemed a period of encouragement for those who favored the Court's compulsory jurisdiction under Article 36(2). Of the 16 cases, 11 were brought before the Court on the basis of the optional clause. It must have appeared that the clause was working as intended. The 1951–1961 period, then, presents a “best case scenario” for analyzing the extent to which we can make positive claims about the viability of compulsory jurisdiction under the optional clause. For reasons to be explained below, conditions for the development of optional compulsory jurisdiction seemed most favorable during this time. Careful consideration of the Court's activities during this period, however, reveals an aspect that is not quite so encouraging toward compulsory jurisdiction.

For purposes of analysis, we shall divide the cases into four categories based on the likely effect that optional compulsory jurisdiction had on the outcome of the case. Category I consists of cases in which no preliminary objections to the Court's jurisdiction were submitted by the respondent state. Category II includes cases in which preliminary objections were lodged by the respondent state against the Court's jurisdiction under the optional clause and these objections were upheld. In these cases the Court ruled that it had no jurisdiction on the basis of the respondent's objections. Category III cases are those where the Court overruled the preliminary objections of the respondent state and thus claimed jurisdiction for itself, but where the merits of the case were decided in favor of the respondent. Finally, Category IV consists of those cases where the preliminary objections and the decision on the merits both went against the respondent state. The reasoning behind this particular breakdown will become clear shortly.

¹⁵ *Fisheries case* (UK v. Nor.), 1951 ICJ REP. 116 (Judgment of Dec. 18).

¹⁶ For purposes of this article, preliminary objections and merits are counted as a single case since we are dealing with the basis of the Court's jurisdiction and that will be found in the initial submission.

Category I Cases

The first case to be brought under the optional clause, the *Fisheries* case,¹⁷ exemplifies our first category. As a result of declarations made by Norway in 1946¹⁸ and by the United Kingdom in 1940,¹⁹ the dispute over the delimitation by Norway of its territorial waters was submitted to the Court for settlement. There were no preliminary objections to the Court's jurisdiction and the case was adjudicated without incident. The style in which this case was brought to the Court was similar to what it would have been had neither of the parties been signatories of the optional clause. Since there were no preliminary objections to the Court's jurisdiction, it is reasonable to presume that the parties felt disposed toward having the Court settle the dispute and that they likely would have reached the same conclusion with or without the optional clause and its promise (or threat) of compulsory jurisdiction.

The second case brought under the optional clause, *U.S. Nationals in Morocco*,²⁰ is also a Category I case. Though the case was brought by France against the United States, the United States filed no preliminary objections to the Court's jurisdiction. Perhaps the lack of preliminary objections was due to the relative newness of the American acceptance of the optional clause and all of the controversy that surrounded it,²¹ or perhaps the explanation was merely that both parties found it reasonable to avail themselves of the dispute settlement procedures offered by the Court. In any event, this case likewise resembles one that might have been brought to the Court by the parties under an ad hoc agreement. Thus, we find no particularly compelling effect rendered by the Court's compulsory jurisdiction under Article 36(2).

There are two other Category I cases in this, the Court's busiest decade. The first of these, the *Guardianship of Infants*,²² is logically indistinguishable from the two preceding cases. The second, the *Arbitral Award* case,²³ is distinguishable only because it did not rely solely on the optional clause as the basis of the Court's jurisdiction.²⁴ Nevertheless, there were no preliminary objections.

Category II Cases

The first case under the optional clause in which preliminary objections were upheld was *Anglo-Iranian Oil Co.*²⁵ Preliminary objections by Iran, that

¹⁷ 1951 ICJ REP. 116.

¹⁸ 1 UNTS 37.

¹⁹ 200 LNTS 486.

²⁰ Case concerning rights of nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 ICJ REP. 176 (Judgment of Aug. 27).

²¹ See, e.g., Preuss, *The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction*, 40 AJIL 720 (1946); Briggs, *Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice*, 93 RECUEIL DES COURS 223 (1958 I).

²² Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Swed. v. Neth.), 1958 ICJ REP. 55 (Judgment of Nov. 28).

²³ Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 ICJ REP. 192 (Judgment of Nov. 18).

²⁴ The Washington Agreement of July 21, 1957 between Honduras and Nicaragua provided the additional basis of the Court's jurisdiction. *Id.* at 194.

²⁵ *Anglo-Iranian Oil Co. case* (UK v. Iran) (jurisdiction), 1952 ICJ REP. 93 (Judgment of July 22).

the reservations to its acceptance of the PCIJ Optional Clause excluded the instant case from the Court's jurisdiction, were upheld by the Court.²⁶ This decision sheds little light on the effectiveness of the optional clause, but at least Iran seemed willing to submit to the initial phase of the case, though perhaps it was confident in its belief that the Court would find in favor of its preliminary objections.²⁷

In the *Norwegian Loans* case,²⁸ the Court upheld Norway's preliminary objections on the basis that Norway was entitled, on the condition of reciprocity, to restrict the Court's jurisdiction in the way that France had stipulated in its own reservation to the optional clause.²⁹

In both *Interhandel*³⁰ and *Aerial Incident of 1955*,³¹ the Court also upheld preliminary objections by the respondent states. In *Interhandel* the objection upheld was that Switzerland had not exhausted local remedies available to it in the United States and that the Swiss claim was therefore inadmissible.³² Interestingly, the Court rejected both U.S. preliminary objections that were based on the optional clause itself.³³ Nonetheless, this case fits our Category II because there was no further action taken or attempted by the Court.

In the *Aerial Incident* case, the Court upheld the objection by Bulgaria that its acceptance of the compulsory jurisdiction of the PCIJ, done on July 29, 1921, was no longer in force for the present Court. Because Bulgaria had not been an original signatory of the United Nations Charter, the Court ruled that the provisions of Article 36(5) of the Statute could not be construed to apply to Bulgaria.³⁴ The Court held that such an interpretation was consistent with the international legal principle that the Court can only exercise jurisdiction over a state with its consent.³⁵

Category III Cases

In *Nottebohm*,³⁶ though the Court unanimously rejected Guatemala's preliminary objections,³⁷ the judgment ultimately favored Guatemala when the Court ruled that Liechtenstein's claim was inadmissible. Guatemala did not participate in the initial phase of the case, but it joined the remainder of the

²⁶ *Id.*

²⁷ It is well known that all states approach contentious cases in the belief that their side will be victorious. See, e.g., Fischer, *Decisions to Use the International Court of Justice*, 26 INT'L STUD. Q. 251 (1982).

²⁸ Case of Certain Norwegian Loans (Fr. v. Nor.), 1957 ICJ REP. 9 (Judgment of July 6).

²⁹ See the French acceptance of Feb. 18, 1947, ratification deposited on Mar. 1, 1949, 26 UNTS 91.

³⁰ *Interhandel* Case (Switz. v. U.S.), 1959 ICJ REP. 6 (Judgment of Mar. 21).

³¹ Case concerning the Aerial Incident of July 27th, 1955 (Isr. v. Bulgaria), Preliminary Objections, 1959 ICJ REP. 127 (Judgment of May 26).

³² 1959 ICJ REP. at 26.

³³ *Id.* at 26-27.

³⁴ 1959 ICJ REP. at 138; see also Gross, *Jurisprudence of the World Court*, 57 AJIL 751 (1963).

³⁵ See Case of the monetary gold removed from Rome in 1943 (Italy v. Fr., UK, U.S.), Preliminary Question, 1954 ICJ REP. 19 (Judgment of June 15).

³⁶ *Nottebohm* case (Liechtenstein v. Guat.) (Preliminary Objection), 1953 ICJ REP. 111 (Judgment of Nov. 18).

³⁷ The objections were based on the expiration of Guatemala's optional clause acceptance of Jan. 27, 1947, which was for 5 years only and was deemed to have expired on Jan. 27, 1952.

proceedings after the Court accepted jurisdiction.³⁸ Perhaps Guatemala displayed a willingness to be held to the compulsory jurisdiction of the Court because of the Court's ruling on Guatemala's acceptance of the optional clause in 1947.³⁹ Alternatively, maybe Guatemala did not really find this an issue worth whatever bad press might have resulted from defying the Court's jurisdiction in the era of postwar euphoria over international law and order. Or perhaps it was simply confident of winning because of Liechtenstein's questionable standing.

In the *Right of Passage* case,⁴⁰ the Court again ruled against the preliminary objections of the respondent but found in its favor on the merits. Speculations similar to those mentioned in our discussion of *Nottebohm* might also apply to this case. At any rate, no negative conclusion about compulsory jurisdiction is to be drawn from any of these cases. Nor should we be overwhelmed by the power of the Court's compulsory jurisdiction. In view of the importance of the issues in the *Right of Passage* case, as well as the virtually incontestable power of India to deny the passage of Portuguese arms over its territory, the Court's decision, while legally sound, can also be regarded as politically expedient. We can only speculate whether India would have complied with an adverse decision by the Court. These two cases represent the only Category III cases during this decade.

Category IV Cases

Cases where there are preliminary objections and where the judgments on the preliminary objections and on the merits of the case go against the respondent state are, arguably, the only true test of the authority of the Court's compulsory jurisdiction. Unfortunately for any determination of the Court's effectiveness in this role, there was only one case during this period in which these circumstances obtained.

That case was the *Temple of Preah Vihear*,⁴¹ between Cambodia and Thailand, in which the optional clause served only partly as the basis of the Court's jurisdiction. Three other treaties were also invoked by Cambodia in this regard.⁴² Thailand's initial preliminary objection was directed at the Court's jurisdiction under the optional clause. Thailand claimed that its Declaration of May 20, 1950 did not constitute a valid acceptance of the Court's compulsory jurisdiction.⁴³ The Court, however, not finding Thailand's arguments persuasive, ruled against the preliminary objection and thus accepted jurisdiction in the case.⁴⁴

³⁸ 1953 ICJ REP. at 111; Hudson, *The Thirty-second Year of the World Court*, 48 AJIL 1 (1954).

³⁹ See *supra* note 37.

⁴⁰ Case concerning Right of Passage over Indian Territory (Port. v. India) (Merits), 1960 ICJ REP. 6 (Judgment of Apr. 12).

⁴¹ Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, 1962 ICJ REP. 6 (Judgment of June 15).

⁴² The Franco-Siamese Treaty of Dec. 7, 1937; the Franco-Siamese Settlement Agreement of Nov. 17, 1946; and the General Act for the Pacific Settlement of International Disputes of Sept. 26, 1928, 93 LNTS 342. *Id.* at 6.

⁴³ 65 UNTS 157.

⁴⁴ 1962 ICJ REP. at 6.

There seems little doubt that the issue in this case was rather important. The principle involved was sovereignty and the placement of part of the boundary between Cambodia and Thailand. Wars have been fought for much less. The *Case Concerning the Temple of Preah Vihear* marks the end of the Court's busiest decade in the use of the optional clause. Whether or not previous cases furnished much encouragement about the optional clause, this case must surely have seemed auspicious to those interested in seeing international law from the domestic perspective. Here at last was a case that seemed to put compulsory jurisdiction to the true test and international law (and the Court) seemed to have fared very well indeed. This case failed, however, to portend the events bearing on the Court's inability to maintain compulsory jurisdiction that have followed.

At this point, it might be worth pondering why the period from 1951 to 1961 saw so much activity involving the optional clause. We suggest two possibilities. First, following the creation of the United Nations and in the thrall of postwar legal euphoria, states may have wanted to demonstrate their ability to resolve disputes peacefully and in a manner supportive of the international legal system. Second, the anti-Soviet feeling that grew particularly rapidly during this decade of severe Cold War probably added to this felt need for legal dispute settlement mechanisms. States, particularly Western states, may have been attempting to demonstrate to their "less legal" Soviet-bloc counterparts that the West was law-abiding even if the Iron Curtain countries were not.

All but one of the cases brought before the Court during this period, whether under the optional clause or not, were litigated between Western-bloc states.⁴⁵ Additionally, the Court, at this point, was dominated by judges from Western states. It was surely a time when all the Western-bloc states, and all that they stood for, were ranged against the "lawless and expansionist" Communist bloc. Consequently, just as in the decades to follow, the willingness of states to litigate during this period was probably based more on the political realities of the international system than on a genuine commitment to compulsory jurisdiction.

Based on our categories, consideration of the Court's aggregate record during this period reveals little reason to be sanguine about optional compulsory jurisdiction. Most of the optional clause cases considered by the Court during this period were Category I and II cases, the two categories that give us the least confidence in drawing conclusions about compulsory jurisdiction. Of the 11 cases in question, 8 fall into these two categories, 4 in each. There were only two cases in Category III, and one in Category IV. Thus, only three cases support the notion that compulsory jurisdiction under Article 36(2) is viable in the international legal system and these cases, for reasons explained above, do not generate a great deal of positive evidence.

⁴⁵ We use "Western" in this sense to denote those states with political leanings or allegiance to the bloc of states that was opposed to the Communist bloc during this period. Thus, the only case not litigated between states of this political persuasion was the *Aerial Incident of 27 July 1955*, 1959 ICJ REP. 127.

While this period does not inspire much confidence in optional compulsory jurisdiction, it certainly is more encouraging than the next 25 years. Since 1961, the Court has been increasingly unable to maintain the viability of compulsory jurisdiction under the optional clause. In the intervening years, the Court has relied only twice on Article 36(2) as the basis for its jurisdiction,⁴⁶ in the *Nuclear Tests Cases*⁴⁷ and *Military and Paramilitary Activities in and against Nicaragua*.⁴⁸ Both of these cases proved detrimental to the development of the Court's compulsory jurisdiction, as the respondents simply refused to participate in the proceedings.⁴⁹

During this 25-year period, the Court's overall activity has slowed considerably. Only 18 cases have been considered, mostly without incident and without the refusal of either party to participate.

At the same time, the instances of defiance of the Court, though not frequent, are dramatic. Most importantly, all of the defiance was caused by the question of the Court's compulsory jurisdiction, either conferred by the optional clause or by compromissory clauses in treaties.

The incidents of defiance are well known and well documented; they have been the focus of much scholarly attention.⁵⁰ Both the *Nuclear Tests* and the *Nicaragua* cases directly involved Article 36(2) of the Statute and both resulted, not only in defiance of the Court by the respondents, but also in withdrawal from the optional clause, by France⁵¹ and by the United States,⁵²

⁴⁶ In *Trial of Pakistani Prisoners of War (Pak. v. India)*, 1973 ICJ REP. 347 (Order of Dec. 15), Pakistan relied, in part, on Article 36(2) of the Statute as the basis for the Court's jurisdiction. Argument of Mr. Bakhtiar, Chief Counsel for the Government of Pakistan, 1973 ICJ Pleadings (*Trial of Pakistani Prisoners of War*) 54-55 (June 4, 1973). The Court, however, never decided the jurisdictional question, as Pakistan asked to have the proceedings discontinued (Order of Dec. 15, *supra*). This case might be classified as an instance of minor defiance since India refused to appear, though it did communicate with the Court throughout the proceedings. See J. ELKIND, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* 62-67 (1984).

⁴⁷ *Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)*, 1974 ICJ REP. 253 and 457 (Judgments of Dec. 20).

⁴⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26), reprinted in 24 ILM 59 (1985).

⁴⁹ France made it clear from the start that it would not participate in the case. This was conveyed to the Court in a letter from France dated May 16, 1973. 1974 ICJ REP. at 255. On Jan. 18, 1985, the United States, having participated in the initial stages of the case with Nicaragua (preliminary objections), issued a formal statement of withdrawal, *supra* note 2. For a discussion of the U.S. withdrawal, see, e.g., Franck, *Icy Day at the ICJ*, 79 AJIL 379 (1985); D'Amato, *Nicaragua and International Law: The "Academic" and the "Real,"* *id.* at 657; Reisman, *supra* note 3.

⁵⁰ See especially H. THIRLWAY, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* 3-20 (1985). Thirlway relies on Article 53 of the Statute of the Court to argue that nonappearance before the Court should not be construed necessarily as defiance of the Court. Article 53 permits legal proceedings to continue even when one party to the litigation exercises its privilege not to participate. Regardless of the Court's good efforts to advance the rule of law in the international arena by hearing cases in which one party chooses not to participate, the efficacy of the Court depends upon the authoritativeness of its voice in resolving disputes in practice and not in theory. See also Highet, *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79 AJIL 992 (1985).

⁵¹ France withdrew its acceptance of the optional clause on Jan. 2, 1974, nearly 1 year prior to the final judgment in the *Nuclear Tests Cases*. 1973-1974 ICJ Y.B. 49.

⁵² See *supra* note 2.

respectively. Whatever one thinks of the impact of these cases on the Court itself, defiance and withdrawal by these two major powers surely augurs ill for the international legal system.

The U.S. defiance in the *Nicaragua* case seems particularly harmful because the Court was placed in the position of carrying through with its Judgment even after the American withdrawal and after statements were issued in January 1985 by the current U.S. administration that it would "defy the Court and ignore further proceedings in the case."⁵³ Furthermore, immediately following the announcement of the Judgment on June 27, 1986, a State Department spokesman announced that the United States was rejecting the Court's verdict because the Court was "not equipped to judge complex military issues."⁵⁴ Thus, the United States stood in clear defiance of the Court and, apparently, above international law. Such behavior appears not only injurious to the efficacy of the Court's compulsory jurisdiction under Article 36(2), but detrimental to the development of international lawfulness as well. Such lawfulness cannot develop as long as states are inclined to place themselves above the law.

It may be asserted with some accuracy that United States prestige may suffer somewhat from this unlawful behavior; but given contemporary political and economic realities, the effect on the world's ranking nuclear superpower will scarcely be noticed. The Court, on the other hand, is far more vulnerable to the effects of defiance of its compulsory jurisdiction and of its judgments. The development of lawful behavior and of compulsory jurisdiction itself is significantly impeded by such behavior. The *Nicaragua* case further demonstrates that the optional clause can only work when states are willing to abide by their earlier commitment, i.e., when they give contemporaneous consent to the Court's jurisdiction. It also suggests that the efficacy of the Court remains threatened as long as the optional clause exists. In the two cases involving the optional clause where the decision on both the preliminary objections and the merits went against the respondent state (Category IV), the record of compliance is only 50 percent.

Compromissory Clauses

Some middle ground in the acceptance of the Court's compulsory jurisdiction is to be found in compromissory clauses in treaties. Although such clauses suffer from some of the same problems as optional clause acceptances, they do have two advantages over these acceptances. First, they are confined to disputes concerning a particular treaty, and thus the subject matter of any dispute that may arise is limited. Second, because most of these clauses are contained in bilateral treaties,⁵⁵ the other party to the possible dispute is usually known. Those clauses found in multilateral and global treaties widen the field of possible litigants considerably, but the subject matter remains limited.

⁵³ N.Y. Times, June 28, 1986, at 1, col. 2 (late ed.).

⁵⁴ *Id.*

⁵⁵ See P. ROHN, TREATY PROFILES (1976).

Nonetheless, the two other incidents of major defiance in the post-1961 period involved jurisdiction granted in compromissory clauses in earlier treaties.⁵⁶ The defiance of the Court by Iceland in the *Fisheries Jurisdiction*⁵⁷ case rested on its noncompliance with an exchange of notes with the Federal Republic of Germany and the United Kingdom on July 19⁵⁸ and March 11, 1961,⁵⁹ respectively. In *United States Diplomatic and Consular Staff in Tehran*,⁶⁰ the Court's jurisdiction was based on compromissory clauses in certain treaties between the United States and Iran.⁶¹

Though we are primarily concerned here with compulsory jurisdiction as conferred by the optional clause, the major conclusions of our argument are supported as well by these two cases. Since they, too, evoked defiance of the Court, it seems that the only safe way to get states before the Court is by their agreement *at the time of the actual dispute*. Other methods all carry a reasonable probability of failure. It is interesting to note that in recent years, two of the successfully resolved cases involved the allegedly lawless state of Libya. Both disputes were brought before the Court by special agreement between Libya and another state.⁶² We think these cases demonstrate that the legal system can serve a useful function and that the Court has a role in the system as a dispute settlement mechanism if it is approached in the consensual mode. Can anyone doubt that Libya would have refused to participate had these cases been an attempt to force the Court's jurisdiction upon it?

It is axiomatic that problems of jurisdiction or compliance rarely arise when states make a special agreement to submit their dispute to the Court.⁶³

⁵⁶ One instance of minor defiance is also worthy of mention. In *Aegean Sea Continental Shelf (Greece v. Turk.)*, 1978 ICJ REP. 3 (Judgment of Dec. 19), Turkey refused to appear in the initial phase of the case; but since the Court found in Turkey's favor on the preliminary objections, no further defiance was forthcoming.

⁵⁷ *Fisheries Jurisdiction (UK v. Ice.; FRG v. Ice.)*, 1974 ICJ REP. 3 and 175 (Judgments of July 25):

⁵⁸ *Id.* at 7-8.

⁵⁹ *Id.* at 179.

⁶⁰ *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ REP. 3 (Judgment of May 24).

⁶¹ The Optional Protocols to the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, 500 UNTS 241 and 596 UNTS 487; and the Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, 8 UST 899, TIAS No. 3853, 284 UNTS 93. 1980 ICJ REP. at 3.

⁶² *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 ICJ REP. 18 (Judgment of Feb. 24), reprinted in 21 ILM 225 (1982), was based on a special agreement between the parties to submit the dispute to the Court, concluded on July 10, 1977. Likewise, *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1983 ICJ REP. 3 (Order of Apr. 26), was based on a special agreement to submit the dispute to the ICJ. It entered into force on Mar. 20, 1982. See 21 ILM 971 (1982).

⁶³ Perhaps one apparent exception should be mentioned. In the *Corfu Channel* case, Albania never paid the damages to the United Kingdom that were awarded by the Court. *Corfu Channel case (UK v. Alb.)* [Assessment of Amount of Compensation], 1949 ICJ REP. 244 (Judgment of Dec. 15). But see, e.g., Highet, *supra* note 50, at 993-94; H. THIRLWAY, *supra* note 50, at 6-7; G. GUYOMAR, LE DÉFAUT DES PARTIES À UN DIFFÉREND DEVANT LES JURIDICTIONS INTERNATIONALES 30, 201-03 (1960), cited in Highet, *supra*, at 994.

Only in this way can states maintain the necessary control over dispute settlement that is part of their *raison d'être*.

Chambers

The recent *Gulf of Maine* case,⁶⁴ the first adjudicated in Chambers, raises the possibility that the Court's compulsory jurisdiction under Article 36(2) might be given new vigor if applied only to cases using Chambers. Presumably, this could be done either through reservations to individual state acceptances of the optional clause or, less likely, through appropriate changes in the wording of the Statute. Changes in the Statute in 1972, designed to facilitate recourse to Chambers, might relieve the anxiety of some states about submitting to the compulsory jurisdiction of the present Court.⁶⁵ The Court has always suffered because states feared that they would not be dealt with fairly. In the early years of the ICJ, many Third World states felt that a court dominated by developed states would not do them justice. Ironically, today's more eclectic Court seems not to engender confidence in either First or Third World states.

The new provisions, which allow Chambers to be selected after consultation with the parties, might alleviate this problem sufficiently for states again to have little difficulty in accepting the Court's compulsory jurisdiction under Article 36(2). As we have noted above, there may have been no significant problems involving Article 36(2) in the 1945-1961 period largely because the Court was dominated by "Western" judges and it adjudicated disputes primarily between Western states. Certainly, in the *Gulf of Maine* case, the United States and Canada should have been comfortable with judges from France, West Germany and Italy, in addition to the two judges of their own nationality, constituting the Chamber. It is also true that this case was handled smoothly and to the reasonable satisfaction of both parties.⁶⁶ Moreover, since it was adjudicated shortly before the U.S. refusal to submit to the Court's jurisdiction in *Nicaragua v. United States*, this case also adds credibility to the claim that the institution of Chambers may help overcome states' reluctance to accept third-party adjudication.

Some aspects of *Gulf of Maine* are worth considering if we are to assess the possible value of compulsory jurisdiction when applied solely to Chambers. First, while the changes in the Statute facilitating recourse to Chambers occurred in 1972, it was nearly a decade before any case was brought before the Court in this way. Second, the two states that did finally make use of Chambers enjoyed a rather special bilateral relationship marked by a long history of peaceful dispute resolution. The United States and Canada are among the most likely pairs of states to seek peaceful methods (both political

⁶⁴ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 ICJ REP. 246 (Judgment of Oct. 12), reprinted in 23 ILM 1197 (1984). For a discussion of this case, see, e.g., Schneider, *The Gulf of Maine Case: The Nature of an Equitable Result*, 79 AJIL 539 (1985).

⁶⁵ See Jiménez de Aréchaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 AJIL 1 (1973).

⁶⁶ Schneider, *supra* note 64, at 539-41.

and legal) to resolve problems between them. Third, this particular dispute, though important economically, was a "low politics" issue, i.e., it did not directly involve national security, and thus recourse to third-party settlement was more acceptable. Moreover, while the dispute had a long history of unsuccessful negotiation, both parties clearly desired a settlement. Finally, this case was submitted jointly to the Court through Special Agreement,⁶⁷ so it is evident that the parties had decided early on to conceptualize the dispute in legal terms.

To what extent, then, does this case hold promise for strengthening Article 36(2) by using it only with recourse to Chambers? Since the institution of Chambers probably will alleviate some of the uncertainty about going to court, states that agree to compulsory jurisdiction solely with respect to Chambers will be less likely to defy the Court if called upon to appear before it. If the point is to insulate the Court from future defiance related to its compulsory jurisdiction, then recourse to Chambers might help. On the other hand, the initial problem and its attendant logic remain. If, at the time of the actual dispute, a state really does not wish to have the dispute settled by the Court, it will still refuse the Court's jurisdiction.⁶⁸ For example, it seems highly unlikely that recourse to Chambers would have changed France's behavior in the *Nuclear Tests Cases*. Conversely, if a state is willing to go to court, it will probably do so with or without Article 36(2); and recourse to Chambers is always a choice, as it was in *Gulf of Maine*. Thus, we are faced with the following question: does the increased probability of adherence to Article 36(2) jurisdiction outweigh the continued possibility of defiance when states find it in their interests not to adhere to the Court's jurisdiction?

III. INTERNATIONAL LAW AND THE IDEA OF LAWFULNESS

If we think of the Court's history in terms of the evolution of international law, our review of the Court's activities will cause concern for two reasons. First, the Court seems to be in a period of decline in terms of its adjudicatory activity. This fact alone is hardly troubling; it only becomes so when studied against the background of international politics. The Court's decline in activity does not coincide with a similar decline in the frequency of international conflict. Thus, the Court's decline in activity is not due to the increased lawfulness or civility of the nations of the world. Disputes, even violent disputes, remain a constant theme of international life; consequently, the declining use of the Court to pursue peaceful and principled methods of dispute resolution indicates that states are turning away from third-party adjudication rather than towards this mode of dispute resolution.

There is nothing new or shocking, however, about cataloging the decline

⁶⁷ For details, see Robinson, Colson & Rashkow, *Some Perspectives on Adjudicating before the World Court: The Gulf of Maine Case*, 79 AJIL 578 (1985); see also Schneider, *supra* note 64, at 543.

⁶⁸ See, e.g., Jiménez de Aréchaga, *supra* note 65, at 3.

in the Court's activities.⁶⁹ Interestingly, one proposed remedy for this decline suggests doing away with the optionality of the Court's compulsory jurisdiction. Many international lawyers insist that the Court's place and prestige in the international system can best be strengthened by making the Court's jurisdiction truly compulsory.⁷⁰ This, it is argued, would have the salutary effect of ending the decline in judicial activity and making the ICJ more nearly resemble domestic courts; and it would symbolize an international effort to "get serious" about international law.

Yet the second cause for concern to emerge from our case review calls the logic of this position into question. Defiance of the Court is the most serious impediment to the evolution of the Court's efficacy. It suggests that at least some states are unwilling to see international disputes in predominantly legal terms, preferring instead to conceptualize these disputes in more traditional political terms. A change in this perspective cannot be brought about simply by making the Court's jurisdiction truly compulsory, which means that any such attempt would likely lead to further defiance of the Court.

The continued and expanded defiance of the Court would have a crippling effect on the evolution of international law. Powerful states would have a pronounced advantage over weaker states under compulsory jurisdiction because of their ability to defy Court decisions and any methods devised to enforce those decisions. Truly compulsory jurisdiction would allow the stronger states an even greater opportunity to posture in favor of lawfulness in international dealings and still defy the Court when they perceive it to be politically desirable. Though it is also possible for small states to defy the Court while posturing in favor of international law (as Iceland and Iran seem to have done), it is more difficult for small states to make a general practice of defiance.

One need hardly belabor the cost of such a scenario to the efficacy of the Court and the legitimacy of international law. A double standard of justice would generate cynicism, or at best skepticism, about international law in the weaker states and it would make international law into little more than an extension of power politics.⁷¹ But there is a second and perhaps even more telling reason for rejecting strict compulsory jurisdiction. A system of

⁶⁹ This decline has been the object of much scholarly concern. See, e.g., Partan, *Introduction: Increasing the Effectiveness of the International Court*, 18 HARV. INT'L L.J. 559 (1977); J. GAMBLE & D. FISCHER, *THE INTERNATIONAL COURT OF JUSTICE: AN ANALYSIS OF A FAILURE* (1976); Deutsch, *Recent Movements Toward Strengthening the International Court of Justice*, 67 AJIL 741 (1973); Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AJIL 253 (1971); Sohn, *Step-by-Step Acceptance of the Jurisdiction of the International Court of Justice*, 58 ASIL PROC. 131 (1964).

⁷⁰ See *supra* note 12.

⁷¹ Small states have long insisted that international law is the province of the powerful and that both customary international law and treaties in the past have been made only to benefit those states controlling the system. See, e.g., M. BEDJAOU, *TOWARDS A NEW INTERNATIONAL ORDER* (1979); G. SCOTT, *CHINESE TREATIES* 98-99 (1975); E. McWHINNEY, *INTERNATIONAL LAW AND WORLD REVOLUTION* 83-101 (1967). There is no need to exacerbate this feeling by insisting on legal machinery that makes the advantages of the powerful even more obvious.

international law should embody, and take seriously, some (if not all) of the principles and ideals that lend credibility and integrity to domestic legal systems. The principle of equal justice is perhaps the first virtue of any legal system.⁷² Any putative system of law that permits a double standard of justice thus fails in an important sense to qualify as a legal system. Tinkering with the Court's jurisdiction should be undertaken only if proposed alterations can feasibly be calculated to enhance (rather than defeat) equal justice. In light of the Court's history, it seems a virtual certainty that strict compulsory jurisdiction would have the opposite of this desired effect.

Though it may sound strange to legal scholars accustomed to thinking that courts of law should have compulsory jurisdiction, we believe that a better method for promoting the efficacy of the Court (and consequently the gradual development of international law) is to remove the Court's powers of compulsory jurisdiction under Article 36(2).

Even a brief review of the history of the western legal tradition is sufficient to make clear that legal systems cannot be implemented overnight. The legal systems employed in the West have evolved over centuries.⁷³ Their formal machinery is perhaps the least significant element of their success as systems of law. Legal positivists are quick to point out that the authority of these systems depends upon their general acceptance by those subject to them.⁷⁴

There is no reason to think things should be different when we turn to international law. General acceptance of international law, and the concurrent realization that international law and the ICJ, in particular, are important contributors to the process of international dispute resolution, are fundamental to the evolution of an international legal system. Conversely, the greater prominence of the idea of lawfulness (i.e., the acceptance of legal authority) in domestic legal systems, as compared with the international legal system, cannot be attributed uncritically to the fact that the operational and mechanical structures of the system are more developed in the former than in the latter. Historically, it makes better sense to think that acceptance of the idea of lawfulness—which evolves, and, logically speaking, must evolve, slowly and cautiously—precedes dramatic developments in systemic architecture. Thus, tinkering with the ICJ's jurisdiction in ways designed to make the Court more nearly approximate a court of law, as this notion is understood in domestic legal systems, must *follow* an increase in the general acceptance of international law.

There are many specific factors that contribute to the general acceptance of lawfulness within any given legal system. Unfortunately, a thorough examination of these factors is well beyond the limits of the present discussion. However, it is safe to say that these contributing factors involve the perception by those agents operating within a given political milieu of a need to refine

⁷² J. RAWLS, A THEORY OF JUSTICE 235-43 (1971).

⁷³ See, e.g., H. BERMAN, LAW AND REVOLUTION 11-46 (1983).

⁷⁴ H. KELSEN, GENERAL THEORY OF LAW AND STATE 110-13 (1961); H. HART, THE CONCEPT OF LAW 107-15 (1961); Hart, *Legal and Moral Obligation*, in ESSAYS IN MORAL PHILOSOPHY 82 (A. Meldin ed. 1958); J. RAZ, THE AUTHORITY OF LAW 250-61 (1979).

the political processes so as to project a sense of security and orderliness into the future. That is, it is reasonable to think of legal systems as the outgrowth of the political need to find effective ways of *organizing* societal efforts to manage and resolve conflict in constructive ways.⁷⁵ Thus understood, the idea of lawfulness does not replace politics; rather, the idea constitutes a refinement of an essentially political struggle.⁷⁶

These comments take on added significance when one considers the place jurisdictional questions have in the development of legal systems. As Berman has shown, jurisdictional questions were of the first importance in the evolution of western legal systems.⁷⁷ To ask about jurisdiction in a legal system is to ask about the kinds of disputes that can be addressed by the system; or to put the point differently, it is to ask about the scope of the system's authority. Jurisdictional questions arose in western legal history because of the multitude of legal systems claiming jurisdiction over certain kinds of disputes. Such questions took on importance not because they were asked in a systemic void but because they were asked in a crowded legal marketplace. To offer but one illustration; in the 11th and 12th centuries, the Catholic Church often claimed authority over some disputes on the grounds that they were matters of papal law, and it frequently found itself confronted by civil authorities who claimed that the disputes in question were secular rather than theological.⁷⁸ The realization that these disputes needed to be resolved and that there had to be some authority that had a legitimate right to settle them was shared by church and state alike. The problem of jurisdiction, however, was basically a problem of how the dispute was to be conceptualized. Was the dispute a secular or a religious problem? This, of course, was a touchy political question that could only be worked out through a historical process that involved the distribution and solidification of the authority of competing legal systems, each within its own emergent sphere.

While international law is not similarly an amalgam of competing legal systems, jurisdictional questions in international law curiously approximate the historical western tradition. International disputes also raise problems about the way they are to be conceptualized. Unlike the problems encountered in the history of domestic legal systems, however, those raised here do not involve deciding which legal system has control of (authority over)

⁷⁵ H. BERMAN, *supra* note 73, at 316-22; Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in THE RELEVANCE OF INTERNATIONAL LAW 177, 195 (K. Deutsch & S. Hoffmann eds., 1971).

⁷⁶ This point will sound odd to anyone who thinks law is something separate from—and ostensibly purer than—politics. See, e.g., H. THIRLWAY, *supra* note 50, at 66; Gross, *supra* note 69, at 261. While legal purists will continue to insist that law is, in some sense, *above* politics, and while they will continue to insist upon the need to transcend the latter to attain the rule of law, these visionary schemes should not blind us to the historical and practical linkages between law and politics. Failure to appreciate these linkages will leave us with an international jurisprudence that is both artificial and empty. See J. SHKLAR, LEGALISM 220-24 (1964).

⁷⁷ Berman states, "The separation, concurrence, and interaction of the spiritual and secular jurisdictions was a principal source of the western legal tradition." H. BERMAN, *supra* note 73, at 99.

⁷⁸ *Id.* at 88-94, 255-64.

the dispute. Instead, these problems involve deciding whether the dispute in question is a legal or a political issue. To borrow from Wittgenstein, the "way of seeing" the dispute is at stake in jurisdictional questions in international law, and this way of seeing the dispute can, and frequently does, become a subject of dispute itself. The emergence of the idea of lawfulness depends upon the tendency of disputants to conceptualize disputes in essentially legal terms, or in terms that place the dispute under the control of legal machinery.⁷⁹ As disputants see their problems in a lawlike way, it becomes natural for them to look to the judiciary as the final point of resolution. As a result, the "conceptualization process" restructures and redefines the nature of the dispute itself and the issues and arguments relevant to adjudicatory dispute resolution. Within domestic legal systems, the process is so advanced that there is no longer any serious disagreement about how to conceptualize disputes. In the United States, for example, conceptualization is so taken for granted that, as Tocqueville observed long ago, almost every dispute becomes, sooner or later, a legal question.

Conceptualization, however, is not similarly advanced in international law.⁸⁰ As Rovine has made clear, states generally conceive of their disputes in fundamentally political terms.⁸¹ Legal dimensions of international disputes are seen as an extension of the political character of these disputes. As political actors, states are understandably reluctant to lose control of the disputes to which they are a party, which means, in part, that states tend to adhere to their own conceptualization of disputes rather than accept that of an alternative source. Though not terribly earthshaking, the point is of some importance for understanding how compulsory jurisdiction obstructs the development of the idea of lawfulness among states. Compulsory jurisdiction, even *optional* compulsory jurisdiction, makes the Court the final determiner of its own jurisdiction. For under compulsory jurisdiction, the Court assumes the authority to impose upon the disputants its conceptualization of a dispute as either legal or political. States are no longer guaranteed that their conceptualization of a problem will control their strategies for its resolution. Thus, in a situation where compulsory jurisdiction is operative, but where the idea of lawfulness has not matured sufficiently for states to conceive of their disputes in legal terms, controversy over the Court's jurisdiction and opposition to the Court's decisions are almost guaranteed. Furthermore, the Court is almost guaranteed to lose efficacy when such tensions develop, and for reasons that now should be reasonably obvious.

Unlike ad hoc agreements, the optional clause requires states to agree to go to the Court about a dispute some time before any dispute arises. States are required to accept the Court's jurisdiction over a dispute that has not

⁷⁹ Fuller, *Human Interaction and the Law*, in *THE RULE OF LAW* 171 (R. Wolff ed. 1971).

⁸⁰ Perhaps the closest thing that we find in international law to the notion of competing legal systems is the principle of the exhaustion of local remedies. Here it is usually clear that the problem has been conceptualized as a legal one by the states; they are quarreling over which legal system, national or international, should have jurisdiction over the legal dispute.

⁸¹ Rovine, *The National Interest and the World Court*, in *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 313 (L. Gross ed. 1976).

yet arisen with a state that perhaps did not even exist at the time they agreed to the optional clause. Consider, for example, the acceptances of both Uruguay⁸² and Panama⁸³ of the PCIJ Optional Clause, both done in 1921. In view of the Court's interpretation of Article 36(5) of the Statute, that PCIJ Optional Clause acceptances of original UN members remained valid for the ICJ,⁸⁴ these two states are in the position of having accepted the Court's jurisdiction over a dispute with any one of nearly a hundred new states that might accept the ICJ optional clause *60 or more years later*. Given the dynamic nature of the international system, can it be realistic to expect a state to agree to such a dispute settlement procedure when so much is unknown, not only about the dispute in question but about the other party as well?

This method of bringing cases to the Court, then, is the least likely to result in an affirmation of the Court's important role in international dispute resolution. The record proves the reasoning. In the cases cited above where the optional clause was brought into play and there were no preliminary objections, the adjudication went smoothly. The presence of the optional clause in such cases, however, is unimportant because they are not unlike those brought under an ad hoc agreement. But where states have been unwilling for one reason or another to abide by their earlier acceptance of the optional clause, the results have been negative for the Court. For here it is the apparently law-abiding states that have chosen to ignore the jurisdiction of the Court because it is being imposed on a situation they do not wish to have adjudicated.

IV. COMPULSORY JURISDICTION AND THE EFFICACY OF THE ICJ

There is good reason to think that compulsory jurisdiction under Article 36(2) is not conducive to the evolution of the idea of lawfulness among states. Nevertheless, as we indicated earlier, the mere presence of the optional clause may have salutary effects upon dispute resolution that are not evident from a review of cases brought before the Court under Article 36(2). D'Amato, for example, suggests that the possibility of compulsory jurisdiction "helps modify" state conduct in ways that avert disputes.⁸⁵ The possibility of compulsory jurisdiction might also incline disputing states that accept the optional clause to negotiate seriously and earnestly rather than risk coming before the Court. We do not wish to imply that compulsory jurisdiction under Article 36(2) does not have such positive effects, although they are notoriously difficult to document. If compulsory jurisdiction does indeed have such effects, this may be taken as evidence that the Court is viewed, at least to some extent, as an authoritative institution by some states. Our claim, however, is that compulsory jurisdiction under Article 36(2) hinders the evolving efficacy of the Court. Defiance of the Court, and particularly de-

⁸² 1961-1962 ICJ Y.B. 215.

⁸³ *Id.* at 208.

⁸⁴ Aerial Incident of 27 July 1955, 1959 ICJ REP. 127.

⁸⁵ D'Amato, *supra* note 14, at 332.

fiance by states like the United States, must surely engender a cynicism about the Court in the international arena that obstructs the development of the idea of lawfulness.

On a more positive note, however, there is some reason to believe that limiting the Court's jurisdiction to ad hoc dispute resolution would facilitate the development of the idea of lawfulness in the international arena. Both Rovine⁸⁶ and Fischer⁸⁷ have stressed the extent to which states view third-party dispute resolution as an extreme measure in the process of *political* dispute resolution. As a political strategy, third-party adjudication is not very attractive, but it is generally considered to be superior to the outbreak of violence. The mere presence of the Court provides one possible means of settling disputes in a peaceful fashion. State recalcitrance about heading to the Court thus abates as alternative efforts at dispute resolution fail.⁸⁸

The logic of the way states view the Court's ad hoc role in the politics of dispute resolution will impel them at some point during a dispute to begin to think it reasonable to involve the Court; and this means that states have a stake in identifying and defining their legal position in the dispute. That is, the politics of dispute resolution frequently encourages states, at some point, to begin to conceptualize their disputes in legal terms. This is a first, yet crucial, step in the growth of the idea of lawfulness. Whether or not this conceptualization can develop to the extent that the idea of lawfulness will become widely shared and firmly entrenched among nations of the world cannot be determined.⁸⁹ It is not possible to outguess history. But it is not possible to rush history either; one cannot impose the idea of lawfulness upon states by insisting on compulsory jurisdiction for the Court. Experience with cases brought by ad hoc agreement makes this eminently clear. The results have enhanced the legitimacy of the Court because states have usually participated without defiance and have generally abided by the Court's decision.

Interestingly, the ICJ's operation under ad hoc jurisdiction has parallels with the way domestic courts operate in the American legal system. Litigants to civil disputes in the United States tend to see going to court as the last and most drastic stage in the process of dispute resolution because a judicial decision closes the dispute for better or worse. Disputants go to court when they are unable to find mutually acceptable solutions to their problem independently. The risk of an unacceptable outcome in court is regarded as a more reasonable option than accepting the compromise presented by the opposition. States, it appears, frequently see the politics of going to the International Court in generally comparable terms; namely, as a way of closing their dispute *that is worth the risk*. The difference, of course, is that the presence of the idea of lawfulness in the domestic context encourages disputants early on to generate legal arguments from which to argue and

⁸⁶ Rovine, *supra* note 81, at 315-24.

⁸⁷ Fischer, *supra* note 27, at 265.

⁸⁸ Coplin, *The World Court in the International Bargaining Process*, in *THE UNITED NATIONS SYSTEM AND ITS FUNCTIONS* 313 (R. Gregg & M. Barkun eds., 1968).

⁸⁹ Onuf, *supra* note 14, at 265.

defend their position. Arguments designed to impress the opposition with the strength of one's legal position enter the municipal dispute resolution process at an earlier stage, and in a more earnest manner, than they do the international dispute resolution process.

Taken together, these considerations indicate that the law-politics distinction is misconceived if understood in dichotomous terms. Once again, law and lawfulness do not replace politics; they redirect politics by imparting orderliness to dispute resolution and content to the dialogue of the dispute. It makes sense to think of the development of lawfulness as movement along a continuum ranging from power-centered to principle-centered approaches to dispute resolution. The states of the world still have some way to go along this continuum. But it makes sense to structure the operational machinery of the International Court of Justice in ways that will facilitate and not hamper progress in the desired direction.

APPRAISALS OF THE ICJ'S DECISION: NICARAGUA V. UNITED STATES (MERITS)

INTRODUCTION

The ultimate authority of the International Court of Justice flows from the same source as the ultimate authority of all other judicial bodies. Every court's decisions are an authoritative source of law in a realistic sense only because they are accepted as such by the community whose controversies the court is charged to resolve. In the case of the World Court, it is the community of nations that confers that authority and under the Court's Statute, its jurisdiction is conferred solely by the consent of the nations whose disputes it is called to adjudicate. It is for this reason that the case *Nicaragua v. United States* and the actions of both the Court and the United States Government in connection with it are of special importance to those who are concerned with international law.

In April 1984, the United States received information that the Government of Nicaragua was about to file a claim against it in the International Court concerning the role of the United States in the ongoing Nicaraguan civil war. In response to that information, the United States filed with the Court a statement in which it suspended its acceptance of the Court's jurisdiction "as to disputes with any Central American state."¹

In November 1984, the Court concluded that it retained jurisdiction over the claim filed by Nicaragua despite the U.S. action and decided to consider the merits of the case.² Following this decision, the United States announced that it was withdrawing from further participation in the case on the grounds that the controversy involved "an inherently political problem that is not appropriate for judicial resolution."³ On October 7, 1985, the United States took a further step and terminated its acceptance of the Court's compulsory jurisdiction under Article 36(2) of the Statute of the International Court of Justice.⁴ Meanwhile, proceedings in the Court continued without further participation by the United States, and on June 27, 1986, the Court handed down its decision on the merits.⁵

In view of the importance of this decision and its implications for both the future of international adjudication in general and the future of the International Court of Justice in particular, the Board of Editors voted in April 1986 to devote a special section of the January edition of the *Journal* to a series of short commentaries on the case. In addition to all members of

¹ DEP'T ST. BULL., No. 2087, June 1984, at 89.

² Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26).

³ Department Statement, Jan. 18, 1985, DEP'T ST. BULL., No. 2096, March 1985, at 64.

⁴ See Contemporary Practice, 80 AJIL 163-65 (1986).

⁵ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

the *Journal's* Editorial Board, more than 20 other scholars were invited to submit comments to be considered for publication. The 16 comments published here represent the response to those solicitations.

The commentaries focus on both the procedural and the substantive legal principles dealt with in the opinion and on the implications of the case and the U.S. actions in response to it for the future of the Court. Several of the comments treat the Court's use of customary international legal principles and consider both whether the opinion accurately reflects current law and its possible impact on the future role of custom in international law-formation. Another important issue, dealt with by several authors, raises the effect of multilateral and bilateral acceptances of the Court's jurisdiction and whether acceptance of compulsory jurisdiction is now a thing of the past. Also treated is the question of the extent to which acceptance of jurisdiction under Article 36(1) remains a reliable base for community expectations about the possibilities for successful international adjudication in future cases. Two authors deal with the question whether the Court has acted most effectively to protect itself and nurture its authority as an effective international judicial body. Other authors examine the impact of the decision on the customary international law of human rights and on the doctrine of *jus cogens*.

Taken together, the comments reflect a wide spectrum of legal and political viewpoints. This section represents a first attempt, at least in recent times, to address institutionally a current international legal issue in a fashion sufficiently timely to permit immediacy of impact, while maintaining sufficient scholarly distance truly to contribute to the development of international legal literature. Both objectives are sought to be achieved by the submissions published here.

These pieces represent each author's best effort to describe, within the limited space permitted, the impact of this case on the development of international law and the future of international adjudication. It is certain, however, that the ripples from *Nicaragua v. United States* are only beginning to spread throughout the international legal system. It is hoped that this special section in the *Journal* will play at least a small role in helping to predict and clarify the ultimate impact of this case on the international process of authoritative decision making.

HAROLD G. MAIER*

THE INTERNATIONAL COURT OF JUSTICE LIVES UP TO ITS NAME

The Judgment of June 27, 1986 of the International Court of Justice¹ provides convincing evidence of the high judicial quality of the Court and its Members. The really exceptional wealth of legal issues considered, care-

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¹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

fully weighed and balanced, and decided in this case will long be a source of study for international lawyers. The present summary observations can examine only selected issues.

In difficult circumstances, intensified by the failure of the respondent party—the United States—to appear in court, the *dispositif*² of the Court's Judgment nevertheless records no less than sixteen separate decisions (numbered (1)–(16)) on legal issues before the Court in this case. This enumeration, moreover, does not include other decisions reached by the Court in the course of its Judgment.

The importance of the Court's decisions is exemplified by decision (3) where the Court, by 12 votes to 3 (Oda, Schwebel and Jennings):

Decides that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.³

By comparable votes the Court decided (4) that the United States had violated rules of customary international law prohibiting the use of force against another state; that (5) by directing and authorizing overflights of Nicaraguan territory and by other acts the United States was in breach of its obligation under customary international law not to violate the sovereignty of another state; that by laying mines (6) and failing to make known their location ((8), by 14 votes to 1), the United States had violated its obligations under customary international law not to use force, not to intervene, not to violate the sovereignty of another state.

By other decisions, the Court found that the United States was in breach of obligations under the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua ((7), (10), (11)).

The Court further decided (12) "that the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations,"⁴ and held that the United States is under an obligation to make reparation for "all injury caused to Nicaragua by the breaches of . . . customary international law enumerated above" (13) and breaches of the 1956 Treaty (14); failing agreement between the parties, the amount of reparation was to be settled by the Court, which reserved subsequent procedures for this purpose (15).⁵

These findings of serious violations of international law by the United States are all the more remarkable because, by a curious happenstance, the Court found itself unable to hold the United States to the terms of basic treaties to which the United States was a party—treaties that were binding upon it and that forbade the actions with which the United States was charged.

In particular, Article 2, paragraph 4 of the United Nations Charter pro-

² *Id.* at 146–49, para. 292.

⁴ *Id.* at 149.

³ *Id.* at 146.

⁵ *Id.*

vides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

Similarly, Article 18 of the Charter of the Organization of American States prescribes:

No State or group of States has the right to intervene, directly, or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

The Court noted that when it gave its Judgment upholding its jurisdiction and the admissibility of the Nicaraguan claim in 1984, it was fully aware "that the United States regarded the law of the two Charters as applicable to the dispute"; and, furthermore, that the United States was "asserting collective self-defence in accordance with the United Nations Charter [Art. 51] as justification for its activities vis-à-vis Nicaragua."⁶

At the same time, the United States invoked the Vandenberg multilateral treaty reservation excluding from its acceptance of the compulsory jurisdiction of the Court "(c) disputes arising under a multilateral treaty unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction." The Court, however, declined to regard this inconsistent attitude as a "waiver" of the reservation⁷ and decided (*dispositif*, decision (1), by a vote of 11 to 4: Ruda, Elias, Sette-Camara and Ni) that the Court was required to apply the reservation so as to exclude the treaty law of the Charters from its adjudication.

The Court's interpretation of the Vandenberg reservation remains curious. In analyzing the reservation in its jurisdictional Judgment of 1984,⁸ the Court noted the obscurity of the reservation, particularly as to whether it was the "treaty affected" (as the reservation states) or the parties to the treaty that were thought to be "affected" by the prospective decision. However, the Court accepted, without recorded analysis, the gloss placed by counsel for the United States on the reservation as referring to "States affected."

The Court correctly found that the reservation was no bar *in limine litis* and observed that the "States affected" could not be identified before "the general lines of the judgment to be given" became clear.⁹ Applying its Rules (Art. 79, para. 7), the Court therefore found that the reservation did not possess an exclusively preliminary character and, in effect, postponed the issue.

⁶ *Id.* at 33-34, para. 46.

⁷ *Id.* at 33, para. 45.

⁸ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392, 421-26, paras. 67-76 (Judgment of Nov. 26).

⁹ *Id.* at 425, para. 75.

Again in the merits phase,¹⁰ the Court gave no consideration to the alternative possibility that a reservation requiring that "all parties to the [multilateral] treaty affected by the decision are also parties to the case" would be so destructive of international judicial processes as to be incompatible with the Court's Statute.¹¹ Instead, the Court proceeded with the "States affected" gloss. Without careful examination of what, if any, legal rights of El Salvador were being "affected," or what, precisely, the word meant in the light of Article 59 of the Statute that the Court's decisions are binding only on the parties to the case, the Court satisfied itself that El Salvador would be "affected"—although it made no such finding regarding Honduras, the base of United States operations against Nicaragua.

The result was that the task of the Court became enormously more difficult. Unable to apply accepted multilateral treaty law—unquestionably binding on the parties—the Court was called upon to decide what rules of customary international law regulating nonintervention, nonuse of force, and respect for territorial integrity and sovereignty constituted the applicable law for the case. The meticulously careful way in which the Court performed this task provides enlightenment on the relation of treaty law (in particular, the law of the Charters) and customary law.

In determining the applicable law and the pertinent facts, the position of the United States in relation to the Court and the attitude to be taken with regard to its contentions were of primary concern to the Court. After participating fully in the proceedings on provisional measures, the jurisdiction of the Court and the admissibility of the Nicaraguan Application—and losing them all—the United States on January 18, 1985 petulantly withdrew from participation in any further proceedings in the case;¹² and, in flagrant disregard of its obligations under Articles 59 and 60 of the Statute and Article 94 of the UN Charter, it denounced the Court's Judgment of November 26, 1984 as "manifestly erroneous," and purported "to reserve its rights" as to any future decision by the Court.

Such a "reservation of rights" the Court found to be "of no effect on the validity of that decision," adding:

¹⁰ 1986 ICJ REP. at 31–38, paras. 42–56.

¹¹ One can only speculate on whether Members of the Court were bemused by the logical trap that Judge Sir Hersch Lauterpacht constructed in *Interhandel*: if the Connally domestic jurisdiction reservation was incompatible with the Statute of the Court, he wrote, then the U.S. Declaration of which it was a part was invalid; it was not separable "so as to remove from the Declaration the vitiating element of inconsistency with the Statute and of the absence of a legal obligation." *Interhandel Case*, 1959 ICJ REP. 6, 101 (Judgment of Mar. 21) (Lauterpacht, J., dissenting). While this view has been followed by a number of international lawyers and is one way of looking at the problem, it may be regarded as excessive to impugn the good faith of a state that solemnly declares itself willing to accept the jurisdiction of the Court in all legal disputes on the interpretation of a treaty and on any question of international law merely because the Declaration may include reservations that the Court, in the exercise of its statutory function to determine the jurisdictional law, may excise as incompatible with the Statute.

¹² Department Statement, DEP'T ST. BULL., No. 2096, March 1985, at 64, reprinted in 24 ILM 246 (1985).

Under Article 36, paragraph 6, of its Statute, the Court has jurisdiction to determine any dispute as to its own jurisdiction, and its judgment on that matter, as on the merits, is final and binding on the parties under Articles 59 and 60 of the Statute (cf. *Corfu Channel, Judgment of 15 December 1949, I.C.J. Reports, 1949, p. 248*).¹³

The Court referred next to Article 53 of its Statute, which provides:

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

In this regard, the Court held explicitly that "the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute."¹⁴

Although this decision is not repeated in the *dispositif*, it is clearly a decision of the Court; and, in interpreting its Statute, the Court rejects the allegation sometimes made that the nonappearing party is not a "party" to the case and is therefore not bound.¹⁵

The fact that the United States was no longer willing to help the Court as to the merits of the dispute gave emphasis to the Court's obligation under Article 53 to "satisfy itself" that the claims of Nicaragua were well founded in fact and law. The Court had the benefit of United States arguments in the earlier phases of the case and one may presume that the Court was not left unaware of the arguments of Judge Schwebel, lengthily set forth with what is termed a "factual" appendix in his dissenting opinion.¹⁶ Appraisal of the evidential value of facts and allegations was, of course, a matter for the Court.¹⁷

Since the Court had decided that "it must refrain from applying the multilateral treaties invoked by Nicaragua in support of its claims, without prejudice either to other treaties or to the other sources of law enumerated in Article 38 of the Statute,"¹⁸ it was necessary to ascertain the consequences of that exclusion in relation to customary international law. To the United States, observed the Court, the consequences were far ranging. The United States had argued that "the provisions of the United Nations Charter relevant here subsume and supervene related principles of customary and general

¹³ 1986 ICJ REP. at 24, para. 27.

¹⁴ *Id.*, para. 28.

¹⁵ Cf., e.g., Dissenting Opinion of Judge Gros in *Nuclear Tests (Austl. v. Fr.)*, Interim Protection, 1973 ICJ REP. 99, 118 (Order of June 22).

¹⁶ See also the "brief" for the United States position prepared by John Norton Moore and published in this *Journal* under the ambiguous title *The Secret War in Central America and the Future of World Order*. 80 AJIL 43 (1986).

¹⁷ See the enlightening treatment of evidence and the Court by Keith Highet, *Evidence, the Court, and the Nicaragua Case*, *supra* p. 1.

¹⁸ 1986 ICJ REP. at 92, para. 172.

international law"; and "since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all of Nicaragua's claims."¹⁹

The Court had effectively disposed of this argument in 1984 in the jurisdictional phase, when it held that the fact that recognized principles of customary international law have been enshrined in the Charters or codified in multilateral treaties

"does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated." (*I.C.J. Reports 1984*, p. 424, para. 73.)²⁰

Nevertheless, the Court carefully reexamined the issue and concluded "that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content"²¹ and that the United States Declaration accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, permitted the Court to determine claims based upon customary international law.²²

Throughout the case, the Court was preoccupied with the fact that the underlying basis of much of the United States argument was its assertion of a right of collective self-defense. This, said the Court, was "the principal justification announced by the United States for its conduct" towards Nicaragua.²³ Already in the jurisdictional phase, noted the Court, the United States had "claim[ed] to be acting in reliance on the inherent right of self-defence 'guaranteed . . . by Article 51 of the Charter' of the United Nations, that is to say the right of collective self-defence."²⁴ With reference to this claim, the Court first held that "in the circumstances of the present case, the issues raised of collective self-defence are issues which it has competence, and is equipped, to determine," without having any need to determine a state's felt "necessity" of resorting to self-defense or "any evaluation of military considerations."²⁵

Concurrently with its exhaustive analysis of the principles of customary international law governing nonuse of force, nonintervention, and respect for sovereignty and territorial integrity, the Court devoted careful attention to self-defense and, in particular, collective self-defense as legal concepts of customary international law. Finding that the right of self-defense—whether individual or collective—was recognized by both parties to the case and was firmly established in customary international law (not to mention its adoption

¹⁹ *Id.* at 93, para. 173 (quoted by Court).

²⁰ *Id.*, para. 174 (quoting the 1984 Judgment).

²¹ 1986 ICJ REP. at 96, para. 179.

²³ *Id.* at 72, para. 131.

²⁵ *Id.* at 28, para. 35.

²² *Id.* at 97, para. 182.

²⁴ *Id.* at 22, para. 24.

as "inherent" in Article 51 of the United Nations Charter), the Court held that for collective self-defense, as well as for individual self-defense, its legal basis "is subject to the State concerned having been the victim of an armed attack."²⁶ Indeed, the Court termed "armed attack" the *sine qua non*²⁷ when it concluded that "the plea of collective self-defence against an alleged armed attack on El Salvador, Honduras or Costa Rica, advanced by the United States to justify its conduct toward Nicaragua, cannot be upheld."²⁸ Accordingly, the Court, in decision (2) of the *dispositif*, rejected the alleged justification.

With regard to "armed attack," the Court observed in part:

[T]he Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States;²⁹

but it is not armed attack.

With particular reference to the relation between "armed attack" and collective self-defense, the Court added:

It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation³⁰—

as the United States had done prior to any determination or request by El Salvador.³¹

On the customary international law rule of nonintervention, the Court is explicit that

the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.³²

²⁶ *Id.* at 103, para. 195. This holding, which was fatal to assertions on behalf of the United States, also contradicts the slippery concept of collective self-defense developed in M. McDOUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 232 ff. (1961), which gained a certain vogue until presented by the United States in this case.

²⁷ 1986 ICJ REP. at 122, para. 237.

²⁸ *Id.* at 123, para. 238.

²⁹ *Id.* at 103-04, para. 195.

³⁰ *Id.* at 104, para. 195.

³¹ *Cf. id.* at 120-22, paras. 233-36.

³² *Id.* at 108, para. 205.

In a significant holding,³³ the Court notes that (despite allegations currently popular in some quarters) no new "right of intervention" has been established in customary international law.

Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition.³⁴

. . . The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law.³⁵

* * * *

Certain observations are in order.

The "authoritative statement of the law regulating the use of force, including the requirements that must be met for the lawful exercise of the right of self-defense," that was called for by James P. Rowles in this *Journal*³⁶ has been provided by the Judgment of the Court in this case.

Administering justice in a case in which one of the great powers sought to evade the administration of justice and consistently sought to politicize legal concepts could not have been a welcome task for judges trained to apply law.³⁷ The Yale "policy-science" approach, which—whether so intended or not—tends to politicize legal concepts such as those regulating collective self-defense and use of force, appears to have provided the basis for much of the United States approach to the case; but the judges were not impressed.

An administration in Washington that takes satisfaction in invading Grenada, hijacking foreign planes in the Mediterranean, bombing people in Libya and attempting to overthrow foreign governments is unlikely to regard making the United States of America a fugitive from justice, dodging a Court decision, as a serious matter. In each case, the end is supposed to justify the means.

The tiresomely repetitive public relations pleas from Washington that the Court lacked jurisdiction in the *Nicaragua* case and that the Court is incapable of dealing with an "ongoing conflict" have lost credibility. In its 1984 Judgment, the Court rejected the plea to its jurisdiction by a vote of 15 to 1; and the plea as to the inability of the judicial function to deal with "ongoing

³³ *Id.* at 108–10, paras. 207–09.

³⁴ *Id.* at 109, para. 207.

³⁵ *Id.*, para. 209.

³⁶ Rowles, "Secret Wars," *Self-Defense and the Charter—A Reply to Professor Moore*, 80 AJIL 568, 580 (1986).

³⁷ The contemptible attack on "Warsaw Pact" judges on the Court by the White House and the State Department overlooks the Statute of the Court and politicizes the functions of a judge. In fact, moreover, no Soviet judge sat in the case here discussed; and any international court applying international law would be fortunate to have on the bench a judge of the learning, fairness and legal experience exemplified by Judge Manfred Lachs of Poland. Cf. his dignified concurring opinion in this case and his letter of July 10, 1986 to the *New York Times*.

conflicts" the Court dismissed in the same Judgment with the observation that "any judgment on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts, and are regarded by the Court as sound in law."³⁸ And that is precisely what the Court did with regard to the legal issues before it.

However, in the *Nicaragua* case, it is not merely issues of jurisdiction and admissibility that were involved. It is substantive rules and principles of international law binding on all states, for which the United States is showing contempt. While the Court, perforce, dealt only with the principles of customary international law, the United States also stands today in violation of the United Nations Charter and the Statute of the Court.

The Court has upheld the law. It remains for the United States to acquire once again a decent respect for the opinions of mankind—and rules of law.

HERBERT W. BRIGGS*

DETERMINING U.S. RESPONSIBILITY FOR CONTRA OPERATIONS UNDER INTERNATIONAL LAW

The only significant point of disagreement this author might have with the June 27, 1986 decision on the merits by the International Court of Justice in the case of *Nicaragua v. United States of America* concerns its failure to hold the United States Government fully responsible for the violations of the laws and customs of warfare committed by the contra forces in Nicaragua. The Court carefully premised this result on the finding that it had insufficient evidence to reach a definitive conclusion on such a delicate matter. Nevertheless, the Court held it established that the U.S. Government largely financed, trained, equipped, armed and organized the contras.¹ Somewhat questionably, in the Court's estimation, it remained to be proven that the Reagan administration actually exercised operational control over the contra forces.

The Court realized full well that its ruling in favor of Nicaragua would be subjected to an enormous amount of hostile criticism from the one source that has traditionally served as its foremost proponent—the U.S. Government. Therefore, in an effort to minimize that criticism, the Court apparently decided to avoid adjudicating the politically charged issue of whether U.S. government officials are personally responsible for any degree of complicity in the commission of international crimes by contra forces against the civilian population of Nicaragua. But just because the Court failed to answer this

³⁸ 1984 ICJ REP. at 437, para. 101.

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¹ Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 ICJ REP. 14, 61–62, para. 108 (Judgment of June 27).

question out of an excess of caution for the perfectly sound reason of better preserving its institutional integrity from unjustified attack provides absolutely no good reason why American international lawyers should not examine the responsibility of U.S. government officials for violations of the laws and customs of warfare committed by our surrogate contra forces in Nicaragua. This Comment will enter upon an area where the Court has feared to tread in the hope that various Members of the Court might reconsider their positions on this matter at least *sub silentio* when it comes to the determination of Nicaragua's damages.

The Reagan administration has disavowed responsibility for some of these contra surrogates in order to cling to the pretense that it has obeyed congressionally mandated restrictions on the conduct of its covert war against Nicaragua. Nevertheless, however the Reagan administration wishes to characterize this war for domestic political purposes, it cannot alter the relevant standards of international law that apply to determine U.S. responsibility for contra activities in Nicaragua. These standards do not depend upon whether the contra war is characterized as covert or overt, or whether it is conducted by the Central Intelligence Agency, surrogate Nicaraguans and Americans, or even U.S. military forces. Furthermore, it is irrelevant to their applicability whether the Reagan administration's attempt to overthrow the Sandinista Government is legal or illegal under international law. Rather, as the Court correctly observed, responsibility turns on the question of whether the U.S. Government actually exercises operational control over the activities of the contras.

In his dissenting opinion, Judge Schwebel relied quite extensively on Christopher Dickey's critically acclaimed *With the Contras* to establish several of his factual assertions. Some of Dickey's other findings can likewise be usefully employed here for the purpose of establishing the precise degree of responsibility attributable to the Reagan administration for its contra proxy war against Nicaragua. Shortly after taking office, on March 9, 1981, President Reagan issued a formal "presidential finding" that called for a stepped-up covert action campaign in Central America.² On November 16, 1981, President Reagan approved National Security Decision Directive 17, which called for the expenditure of \$19 million to build a five hundred-man force to carry out a ten-point covert action program outlined and approved therein.³ And in December of 1981, the Reagan administration informed the House and Senate Intelligence Oversight Committees that a major covert action program was warranted in Central America and indeed was already under way.⁴

Within the U.S. governmental bureaucracy, overall supervision and control for the contra war was vested in the so-called Core Group, presided over by Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs, and consisting of Nestor Sanchez, Deputy Assistant Secretary of Defense, Dewey Clarridge, Latin American division chief of the CIA's Di-

² C. DICKEY, *WITH THE CONTRAS* 104 (1985).

³ *Id.* at 112.

⁴ *Id.* at 101, 112.

rectorate for Operations, and Lt. Col. Oliver North, from the staff of the National Security Council.⁵ From there, the chain of command for the contra war descended directly to the CIA station chief in Tegucigalpa, Honduras and the U.S. ambassador to that country, John Negroponte. The former exercised "control" over the contras' civilian Directorate,⁶ which had been created by the CIA.⁷

The actual conduct of contra hostilities in Nicaragua was under the command of a "unified general staff," which was headed up by the same Tegucigalpa CIA station chief and an unnamed U.S. military officer who was in charge of special U.S. training and paramilitary activities in the area.⁸ From Dickey's account, it is also quite clear that these officials *knew* that the contras were perpetrating large-scale atrocities against the civilian population of Nicaragua, but did little to rectify the situation for quite some time. Eventually, the counterproductive nature of these atrocities forced the CIA to set up a new command and control system for the contra forces, including the appointment of a new contra field commander in the fall of 1983.⁹ But the atrocities did not stop then. Indeed, it was evident from a trip this author took to Nicaragua as recently as November 16-23, 1985, that the deliberate infliction of barbarous outrages upon the civilian population of Nicaragua still remained the operational rationale behind the contras' terror war.

Obviously, in the brief format prescribed here, it would be impossible to summarize all the indicia of U.S. operational control exercised over the contra forces that have so far emerged in the public record, especially in the aftermath of the Hasenfus affair and the Iran-contra scandal, which have confirmed many of these particulars. But even in light of the minimal evidence adduced above, it would only be fair to determine the Reagan administration's degree of responsibility for violations of the laws and customs of war committed by the contra forces in Nicaragua in accordance with the U.S. Government's own official interpretation of the rules of customary international law in such matters. These rules can be found in the Department of the Army Field Manual *The Law of Land Warfare*.¹⁰ This manual was drafted anonymously by the late Richard R. Baxter, then professor at the Harvard Law School, later to become editor in chief of this *Journal*, and finally judge of the International Court of Justice. Until his death in 1980, Professor Baxter was internationally recognized as this country's foremost expert on the laws of war.

Paragraph 498 of the manual makes it clear that any person, whether a member of the armed forces or a civilian, who commits an act that constitutes a crime under international law is responsible therefor and liable to punishment. Such offenses in connection with war comprise crimes against peace, crimes against humanity and war crimes. Here Professor Baxter basically

⁵ *Id.* at 102, 289.

⁶ *Id.* at 171.

⁷ *Id.* at 156-58.

⁸ *Id.* at 153.

⁹ *Id.* at 244-46.

¹⁰ DEP'T OF THE ARMY, *THE LAW OF LAND WARFARE* (Field Manual 27-10, 1956) [hereinafter cited as *FIELD MANUAL*].

incorporated the triumvirate of international crimes recognized by the Nuremberg Charter, Judgment and Principles into the manual.

According to paragraph 499, the term "war crime" is the technical expression for a violation of the law of war by any person or persons, whether military or civilian. Every violation of the law of war is a war crime. Paragraph 500 explicitly recognizes the existence of inchoate crimes with respect to such grievous international crimes. It provides that conspiracy, direct incitement and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity and war crimes are punishable. Thus, Judge Schwebel erred in his conclusion that customary international law does not recognize the inchoate crime of "incitement" to commit war crimes when he tried to absolve the Reagan administration from responsibility for its advocacy of war crimes (i.e., assassinations) to the contrary by means of its infamous "psychological operations" manual.¹¹

Paragraph 501 of the manual recognizes the existence of and standard for vicarious responsibility on the part of commanders for acts of subordinates. Any military commander or civilian official is responsible for the commission of international crimes:

if he has actual knowledge, or *should have knowledge*, through reports received by him or through other means, that troops or other persons *subject to his control* are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.¹²

Here Professor Baxter essentially incorporated the test of vicarious responsibility enunciated by the United States Supreme Court in its seminal decision *Application of Yamashita*.¹³

Field Manual paragraph 509 denies an alleged war criminal the defense of superior orders, whether military or civil, unless the individual did not know and could not reasonably have been expected to know that the act ordered was unlawful, though superior orders may be considered in mitigation of punishment. Paragraph 510 provides that the fact that a person who committed an act constituting an international crime acted as head of state or as a responsible government official does not relieve him from responsibility for his act. On these as in other matters, Professor Baxter once again generally incorporated the terms of the Nuremberg Principles.

Hence, according to the U.S. Army Field Manual itself, all U.S. government officials and military officers who exercised any degree of "control" over the contra forces, knew or should have known that the latter were engaging in war crimes and failed to do anything about it are themselves responsible for such violations of the laws and customs of warfare. This latter category of officials who at least *should have known* that their surrogate contra forces were perpetrating atrocities upon the civilian population of Nicaragua and who failed to do anything about it would include the im-

¹¹ Dissenting Opinion of Judge Schwebel, 1986 ICJ REP. at 259, 523, para. 219.

¹² FIELD MANUAL, *supra* note 10, para. 501 (emphasis added).

¹³ *In re Yamashita*, 327 U.S. 1 (1946).

mediate superiors to all of the aforementioned government officials who actually *knew* about the situation: namely, Secretaries of State Haig and Shultz, Secretary of Defense Weinberger, Director of Central Intelligence Casey, National Security Advisers Allen, Clark, McFarlane and Poindexter, and presumably the President and Vice President.

In addition to the rules of the U.S. Army Field Manual and the Nuremberg Principles, the four Geneva Conventions of 1949 apply to the Reagan administration's undeclared war against Nicaragua by means of surrogate contra forces. According to common Article 1 of the fourth Geneva Convention for the protection of civilians in time of war, the U.S. Government has an obligation not only to respect but also to ensure respect for the terms of the Convention "in all circumstances."¹⁴ Article 2 thereof makes it clear that the Convention shall apply to all cases of declared war "or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." And under Article 29, the U.S. Government is responsible for the treatment accorded to Nicaraguan civilians by its "agents," which in this case would include the contra forces.

According to Article 147 of the fourth Geneva Convention, the contra forces have committed the following "grave breaches" against the civilian population of Nicaragua:

wilful killing, torture or inhuman treatment, . . . wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, . . . and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Pursuant to Article 146, the U.S. Government "shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." Instead, the Reagan administration has refused to discharge even its most elementary obligation under the Geneva Conventions to suppress those "grave breaches" already committed by its surrogate contra forces in Nicaragua.

In a similar vein, the Reagan administration has indicated that it will pay absolutely no attention to the World Court's 1986 decision on the merits in favor of Nicaragua, just as it violated the Court's 1984 indication of provisional measures on behalf of Nicaragua, repudiated the Court's 1984 ruling that the Court did indeed have jurisdiction to entertain Nicaragua's complaint against the United States, and then in a fit of vindictive pique, terminated the U.S. Government's acceptance of the Court's compulsory jurisdiction in 1985. Nevertheless, the major significance of the World Court's

¹⁴ Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

three rulings in favor of Nicaragua will become evident in the pitched battle for U.S. public opinion over the termination or escalation of the Reagan administration's undeclared war against that country. In direct reaction to the Reagan administration's overall foreign policies, large numbers of American citizens have engaged in various forms of nonviolent civil resistance to protest against what they believe to be ongoing criminal activity under well-recognized principles of international law and U.S. domestic law. The Reagan administration's illegal military intervention into Central America has probably been responsible for the greatest number and degree of non-violent civil resistance activities in America today.

The most prominent of these groups is the self-styled Pledge of Resistance Movement, whose 75,000 adherents have taken a pledge that in the event the Reagan administration decides to invade Nicaragua by means of U.S. military forces, its membership will launch a nationwide campaign of non-violent civil resistance activities. The Pledge of Resistance Movement has already called out its members on several occasions to demonstrate against the repeated votes by Congress to provide military and so-called humanitarian assistance to the U.S.-controlled contras. These activities consisted of sit-ins and other forms of nonviolent protest conducted at federal military installations and the offices of U.S. congressional representatives and senators who voted in favor of such aid. In significant part, these courageous individuals have been motivated to protest by the firm conviction that the Reagan administration's covert war against Nicaragua violates fundamental principles of international law, U.S. domestic law and the terms of the United States Constitution.

For example, in *People v. Jarka*,¹⁵ concerning a demonstration before the Great Lakes Naval Training Center on November 14, 1984, the defendants were protesting U.S. military intervention in Central America and the Reagan administration's offensive nuclear weapons buildup. The defendants were charged with the relatively serious crimes of mob action and resisting arrest, despite the fact that they had only linked arms and sat down in the middle of the road in front of the base. After a 3½-day courtroom trial in which defense attorneys produced eight expert witnesses (including this author) on nuclear weapons, Central America and international law, the defendants were acquitted of all charges on April 15, 1985.

Afterwards, several members of the jury were interviewed by representatives of the local news media. Some stated that they were "shocked" to discover that the U.S. Government was committing such gross violations of international law in Nicaragua, and that this factor had led them to acquit the defendants. Moreover, some of the jurors said that they had been so "radicalized" by the trial that they thought they themselves should go out and start to protest in order to do something about the situation.

In the *Jarka* case, the defendants were acquitted by invoking the traditional common law defense known as "necessity," which was incorporated into the

¹⁵ No. 002170 (Cir. Ct. of Lake Cty., Ill., Apr. 15, 1985). See F. BOYLE, DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW (1987).

Illinois Criminal Code. According to Illinois Revised Statutes, chapter 38, paragraph 7-13, conduct that would otherwise be an offense is justifiable by reason of "necessity" if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury that might reasonably result from his own conduct. In *Jarka* the greater public and private injury in Central America was successfully argued to be crimes against peace, crimes against humanity, war crimes, grave breaches of the Geneva Conventions, and violations of the Charters of the United Nations and the Organization of American States and the ICJ's 1984 Order of interim protection on behalf of Nicaragua.

To this list of transgressed prohibitions will now be added the World Court's unequivocal 1986 decision on the merits in favor of Nicaragua. The Court's Judgment will play a critical role in our defense of Pledge of Resistance protesters as well as in the vitally important expansion of their movement. Despite conventional wisdom to the contrary, there currently exists a distinct possibility of direct U.S. military intervention into Nicaragua. This is because of the abject military ineffectiveness of the contra forces due to the vicious and brutal nature of their terror war. The contras' potential sources for indigenous support have long ago evaporated (except on the Atlantic coast) because of the inhumane cruelty they have perpetrated upon the civilian population of Nicaragua. As is evident to anyone who has recently visited that country, there is no way the contras can ever depose the Sandinista Government by themselves, and the Reagan administration must be painfully well aware of this fact.

Hence, the \$100 million military assistance package that Congress recently voted to provide the contras was probably nothing more than a holding operation designed by the Reagan administration to keep a surrogate military force in the field until after the November elections. Direct U.S. military intervention before then could have jeopardized Republican control of the Senate; yet afterwards, there will remain little external restraint upon the belligerent preferences of the Reagan administration. It will either have to negotiate in good faith with the Nicaraguan Government, or else launch a U.S. invasion of that country. A third option would be to keep the contras alive until 1989 when the Reagan administration could conveniently turn the entire problem over to its successor, but only at the horrendous cost of inflicting thousands of more innocent Nicaraguan civilian casualties during the interim.

Whatever the Reagan administration eventually decides to do about its surrogate covert war against Nicaragua, at a minimum the American people must insist that the administration ensure that the contras conduct their hostilities in accordance with the laws and customs of war and the four Geneva Conventions of 1949. In the unfortunate event that the Reagan administration is allowed to escalate its war against Nicaragua any further, the American people will forfeit any right to claim political or moral leadership for the democratic peoples in Europe, the Western Hemisphere and the Pacific. We will turn ourselves into the common enemies of mankind,

and in the process, we will destroy the nature of our own being. As international lawyers, it is incumbent upon us to devise constructive strategies for using the World Court's resounding condemnation of the Reagan administration's undeclared war against Nicaragua in order to head off the further development of such a monumental tragedy.

FRANCIS A. BOYLE*

THE WORLD COURT AND *JUS COGENS*

In the merits phase of decision in the case brought by Nicaragua against the United States, the World Court briefly mentions references by states or publicists to the concept of *jus cogens*. These expressions are used to buttress the Court's conclusion that the principle prohibiting the use of force found in Article 2(4) of the United Nations Charter is also a rule of customary international law.¹

At first glance, the reference to the prohibition of the use of force as a *jus cogens* norm seems to be a minor supporting argument used simply to help justify the Court's decision to recognize the prohibition as an independent rule of customary international law. But a more careful appraisal suggests a different, activist claim by the Court for a more central role in the development of an international public order, whether or not the concept of *jus cogens* is relied upon as the principle of decision. A compelling need for public order lies near the heart of one of the strongest policy reasons for the *jus cogens* concept.² Seen through this prism, the Court's decision makes an underlying claim for a public order role in finding a way to adjudicate a

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¹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27). See in particular para. 190:

[Article 2(4)] is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*" (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook*, 1966-II, p. 247). Nicaragua in its Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as *jus cogens*". The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a "universal norm", a "universal international law", a "universally recognized principle of international law", and a "principle of *jus cogens*".

Id. at 100-01.

² "It appears that from the theoretical viewpoint the most serious attempt to develop a positive law concept of *jus cogens* has been made by those supporters of that legal category who linked it with the notion of an international public policy (or, order)." J. SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL* 63 (1974).

dispute involving a norm thought by many to be *jus cogens*, but without needing to make that determination.

Earlier opinions from the two World Courts have discussed *jus cogens* concepts without any direct application of a peremptory norm.³ The present decision follows this tradition in making no specific application. The Court nevertheless relies on the frequent statements by state representatives and publicists that the norm against the use of force is *jus cogens* to support "further confirmation" of the validity of an independent customary norm against the use of force.⁴ The Court in effect makes a choice between no jurisdiction to decide the dispute under Article 2(4) of the Charter, based on the multilateral treaty reservation by the United States (the Vandenberg reservation), and recognition of customary or general norms of international law as a basis for decision. The policy reason for the choice well might be influenced by overriding concerns for international public order contained in Article 2(4), the principle Professor Henkin calls the "principal norm of contemporary international law."⁵ That public order principle has a municipal law counterpart of *ordre public*. If the Court accepts the Vandenberg reservation but still finds it has jurisdiction over the dispute, what principle but one of basic public order leads it to an independent customary norm as the applicable law? The Court's choice recognizes this principle, the prohibition of the use of force in the relations between states, to avoid the results of the Vandenberg reservation. The substantive principle becomes inextricably part of the jurisdictional choice if the Court is to decide the case.

One may use the *jus cogens* analysis not to justify either the concept or the decision, but to explore and to criticize what in effect is an asserted public order role for the Court.⁶ That ordering function lies at the heart of the conceptual development of *jus cogens*. Unless some supranational or other decision maker has the power to make international public order decisions, no development in the notion of *jus cogens* is likely.⁷ The Court's recognition of a customary norm against the use of force asserts a judicial function to decide cases under the autonomous norm, one that is quite independent of treaties. In this asserted claim, there is great risk that public order decisions about the use of force outside the United Nations framework will shift away from the Court's cognizance. This consequence means that the Court's rec-

³ See *infra* note 24.

⁴ 1986 ICJ REP. at 100, para. 190.

⁵ L. HENKIN, *HOW NATIONS BEHAVE* 129 (1968).

⁶ This view of the will of the Court in aspiring to shape a world public order can be seen in the exchange between Judge Elias and Judge Schwebel. In his separate opinion, Judge Elias expressed regret that Judge Schwebel had used in his dissent an unofficial account of an interview given by Judge Elias, who at the time was President, asserting a public order role for the Court in its decision on jurisdiction on Nov. 26, 1984. Confirming the gist of the quotes used, Judge Elias recognized but made no attempt to correct the slant given his alleged remarks by the outside source or that of the "comments of outsiders." 1986 ICJ REP. at 179-80 (Elias, J., sep. op.). For the quotes used by Judge Schwebel, see 1986 ICJ REP. at 315, para. 115 (Schwebel, J., dissenting).

⁷ See the skepticism of Schwarzenberger, especially, note 13 *infra*.

ognition of an independent customary norm against the use of force has a possible *jus cogens* effect, but not one the Court might like.

For good or ill, the concept of *jus cogens* has survived, at least abstractly. Even after the first waves of skepticism, this category of international law has found acceptance as a general idea.⁸ Through its work on treaties, the International Law Commission developed the concept, which most governments accepted. The American Law Institute has approved and expanded it.⁹ A peremptory norm is like a public-order imperative in municipal systems. It is used to override other less powerful norms by an external public authority, and it may not be changed except by a norm having the same quality.¹⁰ A *jus cogens* norm must have great staying power. When used in service of world public order, its structure ought to offer stability, at least theoretically. By structuring a justification from the presence of a superior norm to nullify or invalidate ordinary treaty or customary norms in conflict with it, the *jus cogens* category is useful to a public authority in maintaining a

⁸ M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 40-41 (5th ed. 1984); I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 512-13 (1979); T. ELIAS, *THE MODERN LAW OF TREATIES* 177 (1974); Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 1, 125-26 (1957 II); H. Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 322-23 (1952); M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 338-50 (1980); A. McNAIR, *THE LAW OF TREATIES* 213-15 (1961); C. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* 19 (1976); Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AJIL 946 (1967); I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 129 (1973); Suy, *The Concept of Jus Cogens in Public International Law*, in 2 CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *PAPERS AND PROCEEDINGS, THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW* 17 (1967); Tunkin, *International Law in the International System*, 147 RECUEIL DES COURS 1, 98 (1975 IV); Tunkin, *Jus Cogens in Contemporary International Law*, 1971 U. TOL. L. REV. 107; Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL 55 (1966); and Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT'L & COMP. L. 609 (1977). See the courses by Gómez Robledo, Alexidze and Gaja in 172 RECUEIL DES COURS 9, 219 and 271, respectively (1981 III).

⁹ Article 53 of the Vienna Convention on the Law of Treaties, based on the work of the ILC, states that a "treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." It then defines such a norm, "for the purposes of the present Convention," as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), reprinted in 63 AJIL 875 (1969).

The *Restatement of Foreign Relations Law of the United States (Revised)* also states that a treaty is void if it conflicts with a peremptory norm of general international law at the time of its conclusion. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §331(2) (Tent. Draft No. 6, vol. 2, 1985) [hereinafter cited as REVISED RESTATEMENT]. Comment *k*, §102 provides a general explanation:

Some rules of international law are accepted and recognized by the international community of states as peremptory, permitting no derogation, and prevailing over and invalidating international agreement and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.

Id., vol. 1 at 33.

¹⁰ See Art. 53, Vienna Convention on the Law of Treaties, *supra* note 9.

stable order. There are some prescriptions of international law, for example, that sovereign states may not change or agree with others to change by *jus dispositivum*: several states ought not to be able to enter a valid agreement among themselves to enslave a minority people, to use force against another state, to liquidate a race thought particularly noxious or to brutalize dissidents contrary to fundamental human rights.¹¹ Similarly, a single sovereign state ought not to be free in all cases to seek a change in or a new interpretation of existing customary international law by unilateral action arguably in violation of it, even when accepting the legal consequences of a possible delict.¹²

In *Nicaragua v. United States*, the choice between two nearly identical substantive norms of usually equal status favored strengthening the "universal norm" of customary and general international law against the use of force. What in international law requires a decision to choose the independence of the customary norm over the treaty effect of the Vandenberg reservation? Equally reasonable is the argument that withholding consent to jurisdiction in cases involving public order treaties unless the affected states are parties means also withholding consent to jurisdiction over disputes under customary norms encompassed in those public order treaties. The decision to choose a substantive public order norm instead of a treaty norm denying application of a public order norm is a preference, a decision with practical effect. Even if not grounded in a peremptory supernorm, the choice implicates *jus cogens* doctrine, for the intense preference for the customary norm against the use of force rested in part on its universal and fundamental principle of world order.

The abstract development of the concept of *jus cogens* proceeded mainly in the work on treaties that took place roughly in the decade of the sixties, but a significant counterpoint of skepticism has remained.¹³ Approval of the

¹¹ The revised *Restatement*, *supra* note 9, takes the position that the rules of §702 defining the customary international law of human rights "are peremptory norms (*jus cogens*), and an international agreement that would violate them would be void." That section contains a list of applicable offenses. *Id.* §702 and comment l, vol. 1 at 468 and 475.

¹² Thus, the concept of *jus cogens* requires the distinction between international delicts, where sovereign states may breach an obligation and accept the legal consequences of state responsibility, and international criminal conduct, where no derogation from the norm is permissible. See Draft Articles on State Responsibility, Art. 19, [1976] 2 Y.B. INT'L L. COMM'N, pt. 2 at 73, 120, UN Doc. A/CN.4/SER.A/1976/Add.1.

¹³ Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455 (1965):

The rise of legal rules which bind without agreement between the parties affected and which override any contradictory agreement presupposes one of two things: the existence of authorities believed to be endowed with supernatural powers (as when lawyer-priests administered *jus sacrum*), or a centralized worldly power which would refuse to compound at least offenses directed against itself or the community at large. This is the crucial point at which criminal law and *jus cogens* emerge.

Unorganized international society lacks such lawyer-priests or any centralized authority with overriding *potestas*.

Id. at 467. Schwarzenberger thinks that the ILC adopted "a graft article, perfectly adapted to the idiosyncracies of a hypocritical age," with progressive trappings of an unrealistic function and a "means of undermining the sanctity of the pledged word." *Id.* at 477-78. In his treatise,

concept continues alongside vigorous criticism from important scholars. The disputes over the limits *jus cogens* theoretically places on treaty making (for example, during the sixties between McNair and Schwarzenberger) are refined in cogent recent criticism by such scholars as Prosper Weil and Jerzy Sztucki.¹⁴ Theodor Meron also has urged caution in creating hierarchical *jus cogens* norms in human rights lest those fully established as customary international law be undermined.¹⁵

By the time the International Law Commission developed the concept fully, including its public order origins, and it was incorporated into the Vienna Convention on the Law of Treaties, the initial skepticism, ameliorated by some careful process limitations, had faded.¹⁶ Acceptance of the concept made nothing clear, however, for its content is not agreed. As Ian Brownlie comments, "more authority exists for the category of *jus cogens* than exists for its particular content."¹⁷ The original idea of the International Law Commission was not to specify particular norms of *jus cogens*, for agreement seemed improbable, but to leave the content to later state practice and development by international tribunals.¹⁸ It was enough to infer the necessity of the concept from positive law sources, and thus to claim support from all nations, including those not of the natural law or naturalist traditions.¹⁹ The

he explains that "*jus cogens*, as distinct from *jus dispositivum*, presupposes the existence of an effective *de jure* order, which . . . in the last resort, can rely on overwhelming physical force." G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 29-30 (1967); see also Schwarzenberger, *The Problem of International Public Policy*, 18 CURRENT LEGAL PROBS. 191 (1965).

An even more compelling skepticism is voiced by Professor Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413 (1983) (danger that *jus cogens* will lead to de facto oligarchy imposing its own ideology to negate the pluralism of international society). For the most recent warning, see Meron, *On a Hierarchy of International Human Rights*, 80 AJIL 1 (1986).

Guggenheim was initially opposed to the concept, but later adopted a more flexible view. I. P. GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC 128 (2d ed. 1967). See also Mann, *The Doctrine of Jus Cogens*, in FESTSCHRIFT ULRICH SCHEUNER 399 (1973); J. SZTUCKI, *supra* note 2.

¹⁴ See Weil, *supra* note 13; J. SZTUCKI, *supra* note 2.

¹⁵ See Meron, *supra* note 13.

¹⁶ In addition to requiring that the peremptory norm be "accepted and recognized by the international community of States as a whole" (Art. 53), the Vienna Convention, *supra* note 9, provides the International Court of Justice with the significant function of determining whether a norm is peremptory before any treaty provision is nullified unilaterally by a state (Art. 66), no doubt to curtail the fear of undermining the stability of *pacta sunt servanda*.

¹⁷ I. BROWNIE, *supra* note 8, at 515.

¹⁸ Commentary on the Commission's draft Article 37 (treaties conflicting with peremptory norm) referred to the divided opinion—notably Schwarzenberger against, and Lord McNair for, adoption—but accepted completely McNair's reasoning that the prohibition of the use of force under the Charter "presupposes the existence in international law of rules having the character of *jus cogens*. This being so, the Commission concluded that . . . it must take the position that today there are certain rules and principles from which States are not competent to derogate by a treaty arrangement." Report of the International Law Commission to the General Assembly, 19 UN GAOR Supp. (No. 9), UN Doc. A/5509 (1963), reprinted in [1963] 2 Y.B. INT'L L. COMM'N 187, 198, UN Doc. A/CN.4/SER.A/1963/Add.1.

¹⁹ Sztucki is critical of the intellectual foundations of a positive law approach to *jus cogens*. J. SZTUCKI, *supra* note 2, at 66.

Commission suggested a few norms of substantive content, nevertheless, without asserting that they were necessarily of peremptory quality.²⁰

Even before the World Court made reference to these suggestions of substance,²¹ the Commission continued citing them as though their content were agreed. Scholars recognized and cited them.²² The *Restatement of Foreign Relations Law of the United States (Revised)* recognized the validity of the substantive suggestions, notably in the comment that "[t]here is general agreement that the principles of the UN Charter prohibiting the use of force are *jus cogens*."²³

The World Court's choice to decide the dispute under an independent customary norm moves beyond the expected modest role for the Court in the Vienna Convention on the Law of Treaties in developing content for peremptory norms in conflict with ordinary norms. The choice is more than a decision between substantive norms in conflict; it is a decision constitutive of the authority to decide. The Court exercises its choice fully cloaked with asserted public authority. While the Court has referred to the concept *jus cogens* a number of times, it has not decided a case, including the present case, solely on the basis of a peremptory norm.²⁴ Even the United States in its Counter-Memorial on jurisdiction cites references that view the norm against the use of force as *jus cogens*, as does Nicaragua.²⁵ The Court ultimately does not have to reach that issue directly, for a better way is open.

While the Court agrees with the United States that the multilateral treaty reservation bars jurisdiction over the dispute under the treaties, it recognizes an autonomous source for the applicable norm against the use of force. The majority of the judges, deciding that a basic customary rule against the use

²⁰ The ILC suggested, but decided not to include, examples of provisions that would make treaties void if violated: the UN Charter prohibitions on the use of force; norms against international crimes; rules for the suppression of slave trade, piracy and genocide; and norms protecting human rights and self-determination. See Report of the ILC, *supra* note 18.

²¹ See generally J. SZTUCKI, *supra* note 2, at 12-22.

²² See *id.* at 58-66.

²³ REVISED RESTATEMENT, *supra* note 9, vol. 1, §102, Reporters' Note 6, at 42. The reporters explain that it is not the Charter but the principles of the Charter that are *jus cogens*. This position, following McNair and adopted by the Court, opens the interesting possibility that even the Charter might be changed to conform to a new peremptory norm. See Weil, *supra* note 13, at 425.

²⁴ In his survey of the jurisprudence of international tribunals, including the two World Courts, Professor Sztucki found 17 possible instances cited, but only 6 mention *jus cogens* or peremptory norms, and then only in separate or dissenting opinions. J. SZTUCKI, *supra* note 2, at 12-22.

²⁵ 1986 ICJ REP. at 100-01, para. 190. The U.S. Counter-Memorial argued that "Article 2(4) of the Charter is customary and general international law," citing the ILC's report on the *jus cogens* article in the draft treaty on treaties, as well as well-known publicists: Professors Brownlie, Henkin, Baxter, Tunkin and Verdross, and Lord McNair. The United States argued that these principles are the "embodiment of general principles of international law," as Nicaragua admitted, and that there is no other "customary and general international law" on which to rest a claim. United States Counter-Memorial (The Questions of the Jurisdiction of the Court to Entertain the Disputes and of the Admissibility of Nicaragua's Application) 194-96 (Aug. 17, 1984).

of force survives the reservation as an independent obligation, proceeds to the substantive question of its violation and to the questions of nonintervention and collective self-defense.²⁶ The Judgment reasons that the treaty norm and the customary norm both derive from a presumed common fundamental principle, an autonomous customary norm, which controls the decision.²⁷ President Singh in his separate opinion uses the concept of *jus cogens* to help support the decision.²⁸ Judge Sette-Camara also refers to the norm as *jus cogens* in his separate opinion (extending it as well to nonintervention) and as overriding.²⁹

The Court's formal avoidance of two important treaties of community law for the purpose of overcoming the multilateral treaty reservation to jurisdiction moves us in an unexpected direction. It opens customary international law to "creative development" through changes in the governing principles of public order by means other than through the treaties. Once the Court has recognized a norm of customary international law, arguably supported by *jus cogens*, free from the Charter norm and free to develop autonomously, then the treaty constraints are loosened for other decision makers as well. The treaty constraints well may be modified by major powers in their international relations in favor of the conscious evolution of different norms defining armed attack, intervention or the inherent right of self-defense.³⁰ Even the majority of the Court has agreed that under the customary norm against the use of force, an armed attack need not be defined precisely the same as under Article 2(4) of the UN Charter; and the requirement to report immediately to the Security Council any use of force in self-defense is not part of the customary norm of *jus cogens*.

We have, then, a double irony. The Court uses the United States position

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[S]o far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. *The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations.* The differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or execution.

1986 ICJ REP. at 96-97, para. 181 (emphasis added).

²⁷ Compare the language of the Court's opinion, *id.*, with that of the commentary of the International Law Commission in its work on treaties, *supra* note 18.

²⁸ President Singh states: "[T]his is not only the correct approach . . . , but also . . . it represents the contribution of the Court in emphasizing that the principle of non-use of force belongs to the realm of *jus cogens*, and is the very cornerstone of the human effort to promote peace in a world torn by strife." 1986 ICJ REP. at 153 (Singh, J., sep. op.).

²⁹ "[T]he non-use of force as well as non-intervention—the latter as a corollary of equality of States and self-determination—are not only cardinal principles of customary international law but could in addition be recognized as peremptory rules of customary international law which impose obligations on all States." 1986 ICJ REP. at 199 (Sette-Camara, J., sep. op.).

³⁰ Just as predicted by Schwarzenberger, Sztucki and others. See *supra* note 13.

accepting the treaty norm against the threat or use of force also as a customary norm possibly having *jus cogens* quality, in part, to justify taking jurisdiction as a matter quite independent of the norm that otherwise falls under the multilateral treaty reservation. Since there are two separate sources of the law, the choice of one source rather than the other means that the norm relied upon survives the jurisdictional bar to the use of the other. Yet the two norms are not different enough to undermine completely the content of the Charter norm. This formalism simply masks the more interesting question of the Court's institutional claim, given the ineffectiveness of the UN security system, to develop an international public order case by case, by breaking away from the strictures of the Charter and treaty norms. The Court untied the treaty norms from their constraints within the United Nations or regional collective security systems, a potentially destabilizing decision, one whose consequences are unforeseen.

The decision based on the validity of an autonomous norm of customary international law free from the Charter is a constitutive one of potentially great significance. The Court's power to decide the future direction of the development of the norm against the use of force (now arguably including nonintervention) and the right of self-defense might also be used by other actors outside the institutional framework of the United Nations system. The recognition of the validity of this development through state practice that modifies customary international law prohibiting the use of force may now fall more easily to the major powers in the international arena, not to the Court. Realistically, we may expect to see control effectively continue to shift to the major powers both outside the United Nations system and outside the competence of the Court. Few major powers in future important cases likely will consent to jurisdiction that permits the Court to develop customary rules of public order regarding the use of force and intervention. Unlike the Marshall Court in United States constitutional history, the World Court did not artfully take jurisdiction only to deny it had jurisdiction, and thus to build its own prestige and acceptance among the most powerful states. Instead, the World Court stretched its judgment to the limits in the jurisdictional phase. Then, seeming to react to the arrogance and disrespect shown it by the U.S. withdrawal, the Court stretched even further to speak again in justification of its jurisdiction over an ongoing conflict in the face of a reservation it overcame by applying a norm of universal appeal. This autonomous public order norm against the use of force is one that has *jus cogens* quality.

However one characterizes the choice of norms governing the dispute, the result is the same. Let us hope that the consequences are not destructive, for we desperately need the Court's juridical good sense and prudence. The international community needs an artful and restrained evolution of legal norms to aid international public order. It does not need a politically vulnerable Court, seen as shaping its decision on jurisdiction to show a powerful nation that it is not above the law as a matter of public policy. As Professor Reisman has warned, the Court has a very limited function in these kinds

of decisions.³¹ Even less do we need a doctrine that gives a green light to powerful nations to interpret to their own ends the now autonomous and more flexible norms governing the meaning of aggression and self-defense. That danger has been the cry of those few skeptics who have doubted all along the validity of a *jus cogens* concept as either a norm of international public policy (*ordre public*) or a positive law substitute for a Vattelian law of nature. Professor Weil has described this situation as allowing the most powerful few elites speaking for the international community simply to impose their version of a suitable ideology in the guise of peremptory norms.³²

In itself, the Court's Judgment is carefully reasoned, but risky. The public appeal of an independent customary international law against the use of force in international relations is powerful. Since this appeal recognizes the norm as a principle of world order free from the Charter structure, perhaps it also partakes of the same dangers that inhere in the concept of *jus cogens*. As Ian Sinclair well understood, *jus cogens* has the potential of both Dr. Jekyll and Mr. Hyde.³³

GORDON A. CHRISTENSON*

TRASHING CUSTOMARY INTERNATIONAL LAW

Central to the World Court's mission is the determination of international custom "as evidence of a general practice accepted as law."¹ Students of the Court's jurisprudence have long been aware that the Court has been better at applying customary law than defining it. Yet until *Nicaragua v. United States*,² little harm was done. For in the sharply contested cases prior to *Nicaragua*, the Court managed to elicit commonalities in argumentative structure that gravitated its rulings toward the customary norms implicit in state practice. The Court's lack of theoretical explicitness simply meant that a career opportunity arose for some observers like me to attempt to supply the missing theory of custom.³

But the *Nicaragua* case was not forged out of the heat of adversarial confrontation. Instead, it reveals the judges of the World Court deciding the

³¹ Reisman, *Has the International Court Exceeded its Jurisdiction?*, 80 AJIL 128, 134 (1986) (quoting Elihu Root on the distinction between impartial adjudication by consent and the conduct of political relations in important matters through diplomatic negotiation, and the skepticism by states of the tendency of international judges to be drawn into the tradition of diplomacy).

³² Weil, *supra* note 13, at 441.

³³ I. SINCLAIR, *supra* note 8, at 131.

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¹ Statute of the International Court of Justice, Art. 38.

² Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

³ D'Amato, *Treaties as a Source of General Rules of International Law*, 3 HARV. INT'L L.J. 1 (1962); A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971).

content of customary international law on a tabula rasa. Sadly, the Judgment reveals that the judges have little idea about what they are doing.

I. PRACTICE AND *OPINIO JURIS*

What makes international custom authoritative is that it consists of the resultants of divergent state vectors (acts, restraints) and thus brings out what the legal system considers a resolution of the underlying state interests. Although the acts of states on the real-world stage often clash, the resultant accommodations have an enduring and authoritative quality because they manifest the latent stability of the system. The role of *opinio juris* in this process is simply to identify which acts out of many have legal consequence.

The World Court in the *Nicaragua* case gets it completely backwards. The Court starts with a disembodied rule, for example, the alleged rule of non-intervention found in various treaties, United Nations resolutions and other diverse sources such as the Helsinki Accords. It then finds that state acceptance of such a rule supplies the *opinio juris* element. Finally, it looks vaguely at state practice. Although the practice of states, notes the Court, has not been "in absolutely rigorous conformity with the rule," the Court "deems it sufficient" that "instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule."⁴

The Court thus completely misunderstands customary law. First, a customary rule arises out of state practice; it is not necessarily to be found in UN resolutions and other majoritarian political documents. Second, *opinio juris* has nothing to do with "acceptance" of rules in such documents. Rather, *opinio juris* is a psychological element associated with the formation of a customary rule as a characterization of state practice. To make matters even worse, the Court gives no independent evidence even of its own theory that states have accepted the nonintervention rule in various resolutions and documents, except for the question-begging fact that the states subscribed to those documents and resolutions. If voting for a UN resolution means investing it with *opinio juris*, then the latter has no independent content; one may simply apply the UN resolution as it is and mislabel it "customary law." Finally, instead of beginning with state practice, the Court ends with it. Conveniently, the Court finds that whenever state practice conflicts with the nonintervention rule, the practice must be an illegal breach of that rule. This procedure similarly robs state practice of independent content. All we need is the original alleged rule and the empty theory that any practice inconsistent with it does not count.

The poverty of the Court's theory is matched by the absence of supporting research into state practice. The only example of practice given by the Court contradicts its own theory: state intervention for the purpose of "decolonization." Lamely, the Court gets around this unwelcome example of state practice by saying that decolonization "is not in issue in the present case."⁵

⁴ 1986 ICJ REP. at 98, para. 186.

⁵ *Id.* at 108, para. 206.

The Court's embarrassment would probably only be increased had it seen fit to mention some of the other categories of intervention that contradict the nonintervention theory, such as humanitarian intervention,⁶ antiterrorist reprisals,⁷ individual as well as collective enforcement measures,⁸ and new uses of transboundary force such as the Israeli raid on the Iraqi nuclear reactor.⁹

It is hard to fashion a *customary* rule of nonintervention from all these practices that are inconsistent with such a rule,¹⁰ but in any event the Court did not even try. Rather, it purports to give us a rule of customary international law without even considering the practice of states and without giving any independent, ascertainable meaning to the concept of *opinio juris*.

II. CUSTOM AND TREATY

The Court fares no better when it considers the impact of treaties upon custom. To some extent, the Court was misled in this regard by the United States, which argued in the jurisdictional phase of the *Nicaragua* case that Article 2(4) of the Charter¹¹ "is customary and general international law."¹² The United States apparently made this strange concession as an attempt to convince the Court that the UN Charter could not be divorced from the case; on this point, the Court was right that the underlying customary law exists in the absence of the Charter. Nevertheless, the Court took the bait and leaped to the simplistic conclusion that the treaty rule of nonintervention was nearly identical to the customary rule.

That conclusion would not have been easily reached had the Court exhibited any understanding of the process by which treaty rules generate customary law. A treaty is obviously not equivalent to custom; it binds only the parties, and binds them only according to the enforcement provisions contained in the treaty itself. However, rules in treaties reach beyond the parties because a treaty itself constitutes state practice. To illustrate this point, let us consider two hypothetical cases: in (a) a rule arises by the pure process of international custom, and in (b) the same rule arises by virtue of its incorporation into a treaty.

⁶ See, e.g., Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229 (J. N. Moore ed. 1974); Reisman & McDougal, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 197 (R. Lillich ed. 1973).

⁷ Consider the recent (1986) U.S. raid on Libya, or the frequent Israeli raids on Palestinian camps in neighboring Arab countries.

⁸ See, e.g., D'Amato, *The Concept of Human Rights in International Law*, 82 *COLUM. L. REV.* 1110 (1982).

⁹ See, e.g., D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 *AJIL* 584 (1983).

¹⁰ However, a narrow "core" rule may withstand scrutiny: that transboundary force is illegal when its purpose and result is the acquisition of territory.

¹¹ Article 2(4) provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

¹² 1986 ICJ REP. at 99, para. 187 (quoted by Court).

(a) Suppose state *A* attempts to seize narcotics on board a vessel of state *B* within *X* miles of *B*'s coast. State *B* protests on the ground that state *A* lacks jurisdiction. If state *A* nevertheless seizes and confiscates the narcotics, and if *B* takes no retaliatory or enforcement action against state *A*, then a customary law precedent will be established for the rule that narcotics seizures are permissible at a distance of *X* or more miles from the coast of the flag state. This "incident" thus has a precedential effect upon international custom.

(b) Suppose states *A* and *B* enter into a treaty allowing the seizure of narcotics at a distance of *X* or more miles off the coast of the flag state. Such a treaty would be as much a resultant of the *A* and *B* "vectors" as was the previously described seizure-plus-no-retaliation incident. Treaties were indeed invented to harmonize competing interests without recourse to threats or forcible measures, and in this fashion are a much more civilized way of creating custom than the normal process described in example (a). For systemic purposes, the outcome is the same in the (a) and (b) cases; namely, the rule characterizing the resolution of the incident is the resultant of the divergent vectors; it is a "customary" rule of state accommodation.

Customary rules, however, are not static. They change in content depending upon the amplitude of new vectors (state interests). Human rights interests, for example, have worked a revolutionary change upon many of the classic rules of international law as a result of the realization by states in their international practice that they have a deep interest in the way other states treat their own citizens.¹³ Thus, reverting to our narcotics example, we can modify the *A-B* rule by a subsequent *C-D* incident that adds to the distance *X*; later, an *E-F* treaty might subtract from the *X* distance; yet later, a *G-H* incident might reinforce the distance established in the *C-D* interaction. Over the long run, the distance *X* will express the resultant of all competing international interests. Another way of phrasing this result is to use Darwinian terms: the customary rules that survive the legal evolutionary process are those that are best adapted to serve the mutual self-interest of all states.

The process of change and modification over time introduces a complex element that is missing from the Court's handling of Article 2(4). It is true that when 2(4) was adopted as part of the UN Charter in 1945, it had a major impact upon customary law. But Article 2(4) did not "freeze" international law for all time subsequent to 1945 (no more than an equivalent customary-law incident would have done). Rather, the rule of Article 2(4) underwent change and modification almost from the beginning.¹⁴ Subsequent customary practice in all the categories mentioned above¹⁵ has profoundly altered the meaning and content of the nonintervention principle articulated in Article 2(4) in 1945.

To be sure, Article 2(4) itself did not have a once-only impact in 1945. It has been reiterated each time a new state joined the United Nations,

¹³ See D'Amato, *supra* note 8.

¹⁴ See Franck, *Who Killed Article 2(4)?*, 64 AJIL 809 (1970).

¹⁵ See text at notes 6-9 *supra*.

because the Charter rules are extended each time to embrace the new member state. But each reiteration does not necessarily reinforce the 1945 meaning, because each new state that joins the United Nations does so in the light of the practice of the Charter from 1945 to the date of its admission. Under the rules of interpretation of international treaties, the subsequent practice of states can modify and change the meaning of the original treaty provisions. Hence, state practice since 1945—whether considered as simply formative of customary international law or as constituting interpretation of the Charter under the subsequent-practice rule—has drastically altered the meaning and content of Article 2(4).

The Court's unidimensional approach to Article 2(4) and to other treaties misses all of these considerations. Its lack of understanding, or conscious avoidance, of the theory of the interaction of custom and treaty undermines the authority of its judgment.

III. CONCLUSION

If the subject matter of the *Nicaragua* case had not been so important in international relations, the Court's judgment could be dismissed as a mere sport. Unfortunately, its importance ensures considerable commentary, and the commentary in turn may create the impression that there is much in the Court's judgment worth studying and analyzing. In my opinion, the judgment is a failure of legal scholarship. It reveals the august judges of the International Court of Justice as collectively naive about the nature of custom as the primary source of international law.

Of course, the biggest missing element might not be judicial erudition as much as the lack of adversarial clash. More than we usually admit of what we admire about judges on any court may be due to the quality of the briefs and arguments handed to them, rather than their intrinsic familiarity or understanding of the law. The World Court would have been well advised to encourage amicus briefs on behalf of the United States, although even then little can substitute for the quality of a team of attorneys responsible for advocating the best interests of their client.

As a formal matter, the Court's decision is binding on the United States even though the United States walked out of court after the jurisdictional phase of the case. Yet, as a practical matter, only decisions that command respect by virtue of their inherent soundness and scholarly thoroughness are likely to have a real impact. The Court is encouraged to render such decisions by its own Statute. Article 53 provides that, when one of the parties fails to defend its own case, the Court must "satisfy itself" that the claim of the party appearing in court is well founded in fact and law. That requirement seems formalistic and empty in light of the *Nicaragua* litigation.

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THE WORLD COURT'S ACHIEVEMENT

Even if conceived of only as a legal text, the array of judicial opinions contained in *Nicaragua v. United States* constitutes an extraordinary document. It represents a fascinating attempt through judicial inquiry to assess convincingly the relevance of law to an ongoing armed conflict. As such, despite procedural objection to entry upon this terrain by the three dissenting judges, it leads the Court to pronounce specifically upon the core issue of when force can permissibly be used in international relations, as well as the contours of a claimed right of collective self-defense in the setting of interventions and civil strife.

What is more startling, the Court adjudicates mainly in favor of a small, beleaguered Third World country that is confronted by a pattern of escalating military intervention being planned and financed by the government of a superpower. This Judgment was rendered under difficult circumstances. The United States Government signaled its bitter opposition in advance to any recourse to judicial procedures, refused to appear during the merits phase of the proceedings, and has already scornfully repudiated the authority of the Court to pronounce upon the issues in controversy. Never in its history as an institution has the World Court been, at once, so prominent and embattled. At this moment of genuine jurisprudential triumph, the Court's institutional authority has been attacked as never before, and from a source previously supportive.

There are myriad matters of legal theory, doctrine and judicial practice raised by the interplay of viewpoints on the Court that tempt commentary, as well as the encounter on a political level between the Court and a leading state. My attempt here is to discuss certain highlights, leaving more detailed inquiry to other occasions.

I. JUDICIAL STYLE AND JUDICIAL FUNCTION

The Judgment of the World Court, joined in by twelve judges on the major findings and opposed by three, on some issues by only one, will long be studied as a positive model of judicial style. It succeeds, in my view, in conveying an overall impression of technical competence and fairness, despite the inflamed setting of a dispute that relates to fundamental issues of political survival and uses of force. Its quality of legal reasoning is admirable; the process by which it reaches conclusions is developed with enviable clarity.

Beyond this, the Judgment is exemplary in striking a balance between fairness to a sovereign state accused of serious violations of international law and a diligent effort to interpret the relevant rules and principles in a constructive manner. If anything, the majority judges lean over backwards to give the United States every reasonable benefit of the doubt. For instance, despite persuasively concluding that the contras are trained, financed and guided by the United States Government, the majority refuses to impute the violations of international humanitarian law by the contras to the U.S. Government. Similarly, while finding that the Central Intelligence Agency

prepared and disseminated a manual for use by the contras that encourages practices in violation of international law, the Court refrains from imputing violations that result to the United States. Considering that the United States refused to participate in the proceedings after the adverse judgment on the jurisdictional phase was rendered, it has to be concluded, I believe, that U.S. nonappearance did not mean that factual and legal considerations favorable to the United States position were not fully and fairly evaluated. Nothing in Judge Schwebel's exhaustive dissenting opinion shakes my confidence in the authoritativeness of the majority assessment of the main lines of controversy.

What is more impressive, perhaps, is the contribution made by the Judgment to the proper exercise of judicial function in an institutional setting of diverse cultures and ideologies. No other World Court judgment is as satisfying in the quality of its legal reasoning, building persuasively its main conclusions on general principles of analysis that enjoy wide support and grapple sensitively with the complicated and elusive factual background of controversy. No effort is made by the Court to buttress this reasoning with the familiar litany of Anglo-Europeans—McNair, Lauterpacht, De Visscher, Gidel, Rousseau, Guggenheim, Anzilotti. The implicit legal hegemony of Western approaches and scholarship is nowhere evident, nor, it should be added, is there any swing, latent or manifest, to Third World or Marxist viewpoints. As such, the majority opinion is of great help to all sectors of world public opinion seeking to comprehend the contours of minimum world public order on matters of war and peace. The possibility of legal universalism has been powerfully validated.¹

In this regard, the majority is to be further commended for the accessibility of its language. Any intelligent person can read this opinion and understand its rationale. No specialized legal background is required, and yet the complexity and subtlety of the fact and law questions are in no way slighted. On the contrary, the reasoning comprehensively considers every possible, plausible objection to its principal legal conclusions.

Further, the question of judicial function is effectively and adroitly handled. The majority demonstrates its capacity to assess even the most controverted facts in an ongoing armed conflict and to pronounce clearly upon their consequences in law. To exempt such issues from judicial scrutiny, assuming jurisdiction is well founded, is to relinquish all those efforts of the last several decades to bring the use of force in international affairs within some type of third-party framework.

Of course, enormous problems remain. Jurisdiction is rarely available in opposition to the political will of a leading state in the national security area, and this case can be treated as an anomaly. Quite probably, in light of this Judgment, leading governments will be more reluctant than ever to agree

¹ I reach this conclusion despite my advocacy elsewhere of a pluralist jurisprudence (Western, Marxist, non-Western) as the most appropriate stance for the World Court. See R. FALK, *REVIVING THE WORLD COURT* (1986). Now I believe a pluralist jurisprudence is preferable to provincial (that is, Western) jurisprudence, but that a universal jurisprudence is best of all.

in advance to submit to the Court legal disputes touching on vital interests, especially on claims of the use of force. Beyond this, the absence of any prospect of enforcement may strengthen the public impression that international law, in general, is worthless. Because this Judgment antagonized the U.S. Government, it can be argued, the weight of public opinion in the world will move to discredit the World Court as the prime judicial institution in international society, even if the decision itself is widely accepted as reasonable.

Such speculations are appropriate, but once the Court was seized with the case, there was little choice but to proceed.² Given this necessity, the majority responded heroically. The Judgment rendered, even if repudiated by the United States Government, provides a valuable basis for public education on the international law of war and peace in the nuclear age. It challenges, as well, the conscience of American citizens, raising the crucial question as to whether we believe the national interest is served by a foreign policy that is not bound by *impartial* interpretations of international law.

II. PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

Perhaps, the most notable achievement of the Court's Judgment is its explication of the law governing the use of force in international relations, especially as it pertains to the complex interplay among concepts of "intervention," "armed attack," "self-defense" and "collective self-defense." To be sure, these issues are embedded in doctrinal controversy associated with varying perceptions of security interests in the world, as well as with antagonistic ideological stances. The fundamental encounter is between essentially *imperial* viewpoints that seek vague and extensive delimitations of these key legal conceptions and *statist* viewpoints that seek clear and intensive delimitations that minimize discretion to interpret and manipulate facts at the governmental level. As seems appropriate, the Court chooses, without expressing such a commitment, the statist approach, one generally favorable to the jural implications of state equality and sovereign rights and to the geopolitical implications of shifting the weight of international law behind the situation and reality of weak states. Such a disposition is *legally* appropriate, regardless of moral and ideological overtones, because the Court is itself part of a formal order of states that purports to deny imperial (or leading) actors a privileged position.

One consequence in real-world politics of this alignment, or historically viewed, this realignment, is to challenge the behavioral patterns of big states, and thereby to abet, however unwittingly, unilateralism and defiance in the capitals of the superpowers. As the Court's response in the Iranian *Hostages* case reveals,³ the relatively weaker state, on occasion, will challenge a statist

² *But cf.* Judge Oda's dissent on this, especially para. 18. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ REP. 14, 212, especially at 219 (Judgment of June 27) (Oda, J., dissenting).

³ *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ REP. 3 (Judgment of May 24).

orientation by boycotting judicial procedures and asserting a defiant conception of respective rights and duties. Nevertheless, it seems correct in the setting of the legal control of force to associate discretionary views toward the use of force with relative reliance on military preponderance. This reliance may be on a limited or regional scale (for instance, France, Israel), as well as on a global scale.

Without entering upon the intricacies of the specific complexity associated with Nicaragua's claims, it is possible to characterize the majority view of these guiding legal conceptions. The posture of the discussion is shaped, in part, by the bearing of the multilateral treaty reservation in the United States acceptance of the Court's compulsory jurisdiction, the interpretation of which divides the majority from the dissent as sharply as any question of substance. The effect of the majority view is to regard the reservation as precluding direct application of the United Nations and Organization of American States Charters. As a result, the content of international law in this dispute *before the Court* must be derived exclusively from customary international law. Yet to discern customary international law, it is helpful for the Court to rely upon conceptions embodied in the UN Charter. The dissenting judges contend that such an attitude toward customary international law amounts to an improper end run around the multilateral treaty reservation, thereby encroaching upon the fundamental idea that a state must give its consent to be bound by the obligation to submit disputes to compulsory jurisdiction. On balance, the majority view that there was no intention by the United States to exempt from compulsory jurisdiction all subject matter addressed by multilateral treaties seems the most reasonable way to construct the reservation, but the argument is somewhat inconclusive, and without any entirely satisfactory resolution.

Once this lingering jurisdictional obstacle is removed, the path is cleared for doctrinal and substantive scrutiny of Nicaragua's various claims that force has been illegally used by the United States. The Court sharply differentiates its elaborate inquiry into the facts from its application of law. Much of the case rests on the character of Nicaragua's role in assisting the revolutionary insurgency in El Salvador. With considerable objectivity and composure, the Court seeks to assess the evidence, taking account of the nonappearance of the United States, yet endeavoring "to guarantee as perfect equality as possible between the parties."⁴ It gives greatest weight to disinterested sources and to admissions against interest, but surveys a wide range of materials for evidence, including such official formulations of United States allegations as are contained in the State Department publication *Revolution Beyond our Borders*.

The Court reaches the crucial conclusion that there exists no basis for construing Nicaragua's support for the El Salvador insurgency as "an armed attack"; hence, there is no ground upon which to invoke "self-defense." And if self-defense cannot be validly invoked, then the United States lacks any permissible basis for using force against Nicaragua, and its uses of force,

⁴ 1986 ICJ REP. at 40, para. 59.

including the mining of harbors, arming and guiding of the contras, and military overflights, are illegal uses of force that amount to illegal interventions and acts of aggression. The Court acknowledges that Nicaragua's help to the insurgency in El Salvador might constitute an "intervention," but refuses to accept the view that counter-intervention in such a situation can *legally* include uses of force against the political independence and territorial integrity of the intervening state. Furthermore, the Court holds that under some circumstances actions taken to overthrow another government might qualify as "an armed attack," but concludes that the evidence here does not nearly measure up to attributing such a role to Nicaragua. At most, the evidence establishes a record of diplomatic support for the insurgency and some sporadic involvement in the transshipment of arms to insurgent forces, especially through the early months of 1981. In assessing United States goals, the Court aptly notes that the escalation of U.S. military involvement occurred *after* Nicaragua had greatly reduced its alleged role in El Salvador and that the rationale for U.S. policy increasingly shifted from interdiction of Nicaraguan aid to the insurgents to the restructuring of internal political arrangements within Nicaragua.

Here again, the Court responds with care and clarity. It refuses to regard the 1979 resolution of the OAS Meeting of Consultation as establishing a *legal* burden on Managua to practice pluralist democracy. Contrary to the position of the United States Government, the Court views this resolution as a *political* undertaking, and certainly not as a valid basis for mounting an intervention against Nicaragua or using force to promote the White House's ideas about conformity with the 1979 resolution.

The Court gives the United States the benefit of the doubt in most gray areas. It even rejects Nicaragua's claims that military maneuvers in Honduras and offshore were illegal interventions and adopts a very restrictive view of the relationship between contra conduct and U.S. accountability. Surely, a biased or ideological judicial body would not lean over backwards to restrict U.S. responsibility in this manner.

In the end, the Court decides that the claim by the United States to have used force as part of its undertaking to join in the collective self-defense of El Salvador lacks factual foundation because no prior armed attack occurred. Such a central inference is borne out by a reading of the vast literature on the internal conflict in El Salvador, very little of which gives much weight at all to Nicaragua's role.

III. JUDGE SCHWEBEL'S DISSENT

Judge Schwebel has performed a notable service by setting forth so fully his generalized support of the U.S. legal position, and by trying to reinforce the legal analysis with an elaborate factual annex that runs to 132 pages, 4 pages longer than his legal opinion. It is also notable because Judge Schwebel distances himself from several aspects of the official United States position, including nonparticipation in the substantive proceedings themselves, responsibility for distributing to the contras a manual urging violations

of the laws of war, and mining of Nicaragua's harbors without proper notification to international shipping.

Most important, Judge Schwebel acknowledges "that there is room for the Court's construction of the legal meaning of an armed attack, as well as for some of its other conclusions of law."⁵ In effect, Judge Schwebel admits that the subject matter is in an area of legitimate controversy, and that the majority opinion deserves the respect of law even if he disagrees with its conclusion. Such a position is dramatically different from the Reagan administration's rejectionist view of the decision as reflecting the biases of Communist and Third World judges, and therefore as deserving no respect.

On the larger questions, however, Judge Schwebel's dissent goes down the line with Washington. He characterizes the facts to support a legal conclusion that El Salvador was the victim of an armed attack and that therefore all subsequent uses of force by the United States represented a valid reliance on the doctrine of collective self-defense. Further, he accepts the view that the United States had a special obligation to enforce the commitment by Nicaragua to the OAS that it would establish a pluralist democracy within its borders.

Ironically, but helpfully, Judge Schwebel's dissent reinforces the persuasiveness of the majority opinion. It strains so hard and relies on such one-sided and partisan source material, yet arrives at a set of legal conclusions that is in dramatic variance to the premises of "the Reagan Doctrine" without ever confronting the contradiction between what the United States demands of Nicaragua and its own foreign policy in relation to foreign insurgencies.

One matter of substance can be commented upon. Somehow, Judge Schwebel appears to accept covert operations as a legitimate use of force in international affairs if characterized as "defensive" by the user. He observes, for instance, that such activities "were not reported to the United Nations Security Council, as, by their nature, covert defensive measures will not be."⁶ The imperial perspective seems prominent here. We are hardly prepared to endorse a conception of legitimate covert operations that validates state-sponsored terrorism characterized by its user as "defensive," but this is precisely what is implied. The majority cites President Reagan's claim that "covert actions have been a part of government . . . as long as there has been a government" and that a country has "the right . . . when it believes that its interests are best served to practice covert activity."⁷ To exempt covert operations from legal accountability must certainly not have been Judge Schwebel's intention, but his reasoning and language leave room for this unfortunate inference.⁸

⁵ *Id.* at 272, para. 15; *cf. also id.* at 309-10 and 317-18, paras. 104 and 121-22 (Schwebel, J., dissenting).

⁶ *Id.* at 269, para. 7.

⁷ 1986 ICJ REP. at 49, para. 83.

⁸ For a careful survey of persistent reliance on covert operations, see the recent book J. PRADOS, *PRESIDENTS' SECRET WARS: CIA AND PENTAGON COVERT OPERATIONS SINCE WORLD WAR II* (1986). Few specialists would argue, I believe, that the character of this activity can be reconciled with international law.

A final criticism. Judge Schwebel follows older World Court tradition by bolstering his analysis of the issues with abundant reliance on the modern masters of continental and Anglo-American international law. At this stage, in my opinion, such reliance weakens rather than strengthens the appeal to international law, as it fosters the impression of Western origins, bias and ideological hegemony.

IV. CONCLUSION

We are left in the quandary of how to assess an unenforceable World Court decision on a matter of high salience. No doubt, many will follow those liberal commentators who are beginning to say that, regretfully, the World Court cannot be entrusted with issues bearing on national security. If I thought that the Pentagon and White House were capable of consistently upholding the national interests of the American people in the area of war and peace, I might agree. As matters now stand, political democracy requires the extension of constitutionalism to the domain of foreign policy. It is not enough for leaders to invoke international law. Impartial assessments are needed, and in this difficult instance, the World Court has demonstrated its competence and capacity to do just this. In my view, anyone with even a 25 percent open mind is likely to be convinced by the majority opinion here.

It may be that governmental defiance will not carry the day. Support for President Reagan's Nicaragua policy is shaky in Congress and among the citizenry. If the effect of the World Court decision is to shift even slightly the internal and international balance of opinion on the wisdom and propriety of further uses of force against the Sandinista Government, it may yet contribute to a political process whereby legal claims are indirectly upheld. We must rethink the question of judicial effectiveness in the broader setting of public opinion and political democracy, and not confine our evaluation to conventional concerns about governmental nonresponsiveness.

RICHARD FALK*

DRAWING THE RIGHT LINE

As a recurring feature of the Cold War that has dominated international relations for the past four decades, foreign intervention in civil armed conflicts has focused and inflamed scholarly debate over the content of the relevant legal restraints. Conflict has raged particularly around the following issues: First, what forms and degree of assistance to rebels constitute an armed attack within the meaning of Article 51 of the Charter authorizing individual and collective self-defense? Second, in cases where assistance does not reach the armed attack threshold, are there any circumstances in which the target state and/or its allies may nevertheless use forceful measures to terminate it?

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The case of *Nicaragua v. United States* presented the International Court of Justice with its first opportunity to confront these issues. If one takes decisions of the Court to be extremely persuasive statements of prevailing law, as I do, then the grounds for legitimate dispute have been sharply narrowed.

On the one hand, the Court concludes that there are circumstances where aid to rebels can be deemed an "armed attack" with all the attendant legal consequences. On the other, it categorically rejects the claim that a state crosses the armed attack threshold merely by arming the rebels. Nor does it appear that arms plus advice and sanctuary for rebel leaders suffice to transform illegal intervention into an armed attack. What will suffice, if I understand the Court correctly, is a level of collaboration exemplified by the Bay of Pigs, that is, where the rebels are organized, trained, armed and then launched by their patron in an assault of such dimension that, if it were carried out by troops of a foreign state, there would unquestionably be an armed attack. Presumably (although the Court did not have to address this case), the dimension can be measured over time; in other words, multiple infiltration by small units can equal a single mass border crossing.

Infiltration into South Vietnam of Vietcong units from the North would seem to have satisfied the Court's standards, as does our relationship with the Nicaraguan contras. Nicaraguan assistance to the rebels in El Salvador, even if one accepts the most extravagant U.S. government claims concerning its dimensions, does not.

With respect to the second issue, the Court seems to distinguish between the response of an individual state to an illegal intervention in its affairs and the response of a third party on its behalf. If I understand the Court correctly, the former may retaliate by means short of an armed attack and which in addition comply with the tests of necessity and proportionality. It follows, then, that El Salvador, the party aggrieved by Nicaragua's assistance to its rebels, but not the United States, is justified in providing arms to the contras, unless Nicaragua has ceased aiding its rebels or it appears reasonably likely that an end to such assistance could be achieved through negotiations. What is not entirely clear, however, is whether the Court intended to prohibit a third party such as the United States from sending arms to El Salvador on the condition that they be transshipped to the contras. Presumably, the mere knowledge of Salvador's intention to share U.S. military aid with the contras would not render such aid illegitimate.

While this is not an inevitable interpretation of contemporary international law, in my judgment it is the one that most effectively reconciles the international system's preeminent interests: conflict containment and national sovereignty (expressed in terms of territorial integrity and political independence). Since aid to rebels is a ubiquitous feature of the contemporary state system with its many porous borders, authoritarian and narrowly based governments, sectarian strife and transnational sympathies, anything other than a high and conspicuous threshold between an armed attack justifying the exercise of self-defense and lesser forms of intervention, particularly forms that transiently threaten freedom of choice but not the long-term

territorial integrity or political independence of the state, would invite internationalization of essentially civil conflicts. Of course, U.S.-Soviet competition heightens the prospect and gravely aggravates the potential consequences of civil conflicts spilling across national boundaries. By distinguishing between individual and collective response to illegal intervention, the Court seeks to reduce the risk of direct involvement by a superpower, presumably on the plausible assumption that because of their concern with "credibility" on a global basis, the great powers tend to impute cosmic significance to minor conflicts.

War avoidance, however, rather than being the system's summit value, enjoys at best a standoff with national sovereignty. The Charter, after all, is not a mandate for pacifism. It recognizes an inherent right of self-defense. Hence, the Court could not reasonably hold that aid to rebels can never serve as the equivalent of an armed attack. For in that event, one state could with legal impunity eliminate another as an independent political actor through the medium of a mercenary army recruited from the citizens of the target state.

One obstacle to this stratagem for subverting another state's independence is the still unchallenged right of a third power to aid a recognized government within its territory. But not every vulnerable state may have a white knight willing to provide large-scale assistance. Moreover, even where one is available, inability to attack the rebel base will in some cases promise a more prolonged and costly involvement. Thus, the knight will have additional incentive to remain in his castle or to return to it before the damsel is secure.

It is as difficult to generalize about the impact of foreign assistance on rebellions as it is to generalize about rebellions. Nevertheless, I think one can say with little fear of contradiction that most subversive movements fail with or without some measure of external aid. Through their control of the bureaucracy and the national communications network, of the principal cities and ports, of the security forces and foreign reserves and jobs, and through their ready access to the international arms market, established governments begin with immense advantages. A few manage by virtue of extraordinary ineptitude and avarice to activate a broad, multi-class opposition, which eats away at their human base until the superstructure finally topples.

In a world drowning in arms available with no questions asked to anyone with ready cash, few rebels are critically dependent on foreign patrons, at least before they have multiplied to the point where, properly armed, they can engage government forces in large-unit combat. Writers eager to justify treating aid to rebels as the equivalent of an armed attack tend wildly to exaggerate the costs of counterinsurgency. Their favorite cliché is that guerrillas win if they do not lose, in other words, that the government must annihilate its opponents or face eventual defeat. This is one cliché that lacks the simple dignity of truth. If the bulk of a nation's human and material resources is in areas inhospitable to guerrilla operations, governments can survive indefinitely without eradicating the rebels, can even prosper (like the Government of Thailand, for instance) while guerrillas wither in the bush.

If, as I believe, the availability of arms and advice from a foreign patron is an insufficient condition for the outbreak of an authentically indigenous rebellion, much less its development into a force capable of replacing the recognized government, then it seems fair to conclude that in prohibiting third-party retaliation against the rebels' arms supplier, the Court has not, in the process of restricting legal justifications for cross-border escalation of civil strife, radically discounted the value of political independence. From one perspective, the decision can be seen even to enhance its value, depending on whether or not one regards a recognized government as the exclusive repository of national sovereignty.

In the colonial context and in the name of national self-determination, the United Nations has gone behind the political institutions established by metropolitan governments to locate sovereignty in the people of the territory. There is, therefore, some precedent at the global level for regarding people, not governments, as the ultimate locus of sovereignty. One regional precedent pointing in the same direction was the resolution of the OAS Organ of Consultation calling for the resignation of Anastasio Somoza in the light of overwhelming popular opposition to the continuance of his reign. On this view of sovereignty's source and on the assumption that rebellions rarely succeed unless the rebels enjoy very broad popular support vis-à-vis the incumbents, a decision adding yet another weapon to the incumbent's vast armory of advantages would have undermined true political independence.

My assumption about the normal prerequisite for a successful rebellion is least plausible where a foreign patron does not serve merely as rebellion's armorer and adviser, but rather plays a central role in its creation, organization, financing and training and in its tactical and strategic direction. Because there have been cases where foreign patronage was essential for the emergence of large-scale insurgency threatening the survival of the established political authorities, immunization of the patron from retaliation under all circumstances could not have been squared with the indisputably powerful claims of national autonomy. The Court has drawn as bright a line as the conflicting values permit and it has drawn it in the right place.

Because of the Court's position on the basic legal issues, and because those issues have been relentlessly contested in every sort of forum and scholarly journal, the refusal of the United States to defend its position on the merits in no way undermines the force of the Court's conclusions. As I pointed out above, given the Court's statement of the law, U.S. aid to the contras would be culpable even if one accepted at face value the administration's claims about Nicaraguan aid to Salvador's insurgents.

Since on the basis of its past performances, no one could have confidently anticipated the Court's laudable, but bold, resolution of such fundamental legal issues, I think we need to look elsewhere, though not far, for an explanation of the administration's decision to cut and run. The fact is that the administration was bound to lose however the Court ruled on the question whether arming rebels triggered rights to the exercise of collective self-defense. For recourse to force would in any event remain subject to the condition that nonviolent remedies have been exhausted.

For several years the comandantes in Managua have been signaling their readiness to trade the option of aiding entrepreneurs of revolution elsewhere in Central America for U.S. tolerance of Nicaragua's revolution, such as it is. Undisputed legal norms require Washington to test the bona fides of that offer. By upping the ante, by demanding power sharing in Managua (possibly as a ploy for eliminating the Sandinistas altogether), the United States has stepped outside the bounds of possible legal justification. As for the moral dimension of policy, like that impeccable Latin democrat, Mario Vargas Llosa, I find it hard to envision democracy taking root amid the ruins and the White Terror that would follow a U.S.-powered occupation of Nicaragua's cities by the contra armed forces. If the past is prologue, we should anticipate ending up not with a second Costa Rica, but rather with another Guatemala of the past three decades: Murder Inc., with a flag.

TOM J. FARER*

SOME OBSERVATIONS ON THE ICJ'S PROCEDURAL AND SUBSTANTIVE INNOVATIONS

The decision of the International Court of Justice in the case between Nicaragua and the United States brims with important procedural and substantive implications for the future of law and adjudication in disputes between states.

This was a case that, essentially, turned on the facts, and the Court made important decisions bearing on the procedures of fact determination. Some of these seem inadequately reasoned. In only one sentence the Court explained its refusal to invoke powers under Article 51 of the ICJ Statute that allow it to form an independent investigative body to explore crucial, contested data. The judges justified that important choice with no more explanation than that it would not have been

practical or desirable, particularly since such a body, if it was properly to perform its task, might have found it necessary to go not only to the applicant State, but also to several other neighbouring countries, and even to the respondent State, which had refused to appear before the Court.¹

With the factual issues both decisive and murky, and with one of the parties absent, the effort of undertaking an on-the-spot investigation might have been especially warranted.

Having decided to confine all activities to its seat, the Court was left to sort out a welter of contradictory evidence presented by the parties in order to determine which of them had engaged in what activities at what time.

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¹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 40, para. 61 (Judgment of June 27).

While the United States did not participate at the *merits* stage, much evidence had already been placed before the tribunal at the earlier phases and more was made available to the judges, who were allowed to take note of information obtained outside the formal proceedings.² In those proceedings, the presented evidence included testimony of witnesses, sworn statements by government leaders, other statements by relevant officials, documents, photographs, newspaper reports and reports of various governmental and non-governmental investigators, including hearings and studies by U.S. congressional committees.

U.S. nonappearance, as the Court remarked, created a "general disadvantage," especially because of the lack of witnesses to dramatize and support U.S. assertions and the failure of U.S. lawyers to confront the witnesses produced by Nicaragua.³ The principal disadvantage to the United States, however, derives from the nature of fact-centered litigation pitting a closed against an open society. Nicaragua was able to prove its allegations of fact almost entirely with evidence provided by Americans, ranging from statements made by the President to assertions by members of Congress, a former CIA agent, journalists, academics and human rights investigators. This gave Nicaragua an enormous litigating advantage over the United States, which could scarcely expect a closed society to permit its citizens to provide evidence of Nicaraguan complicity in the El Salvador insurgency. Indeed, Nicaraguan officials uniformly attested to the nation's innocence of all wrongdoing. Inevitably, the United States had to rely on photographs, documents and statements, much of which the Court—except for Judge Schwebel whose opinion includes an extensive "Factual Appendix"—appeared to discount as "self-serving."

This evidentiary disadvantage was made worse by the Court's formulation of an evidentiary rule that underscores the lesser weight to be given to "self-interested" evidence, as opposed to evidence "against interest." The judges were quite explicit that statements "emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission."⁴ The Court thought that two sources of evidence were "prima facie" of "superior credibility"; namely, evidence of "disinterested witnesses" and "evidence of a party . . . against its own interest."⁵ It is not surprising, given those rules, that the facts alleged by Nicaragua were easily verifiable by admissions against self-interest,⁶ whereas those asserted by the United States were unable to be verified to the Court's satisfaction. Nicaraguan government officials and, for that matter, private citizens hoping to remain at large in the country do not make advertent admissions against their nation's self-interest. Americans do, and, where

² Speaking of the Department of State's publication *Revolution Beyond our Borders*, the Court remarked that it was aware of its contents. *Id.* at 44, para. 73.

³ *Id.* at 42, para. 67.

⁴ *Id.* at 41, para. 64.

⁵ *Id.* at 43, para. 69.

⁶ *Id.*, para. 70.

covert operations are concerned, American officials may be compelled by law to make disclosures to numerous persons, some of whom make disclosures to others. The Court's ruling on the relative weight of factual evidence may operate to skew the fact-finding process significantly in favor of closed societies, a possibility uncondusive to growth in the ICJ's role.

Even more important than the Court's ruling on the weight of various kinds of factual evidence was its decision on sources of law. The majority's emphasis on customary law is generally to be welcomed, but its application to this dispute creates problems. Once the majority judges had resolved that the Vandenberg reservation to the U.S. acceptance of Article 36(2) jurisdiction would preclude them from applying the law of the UN and OAS Charters, they nevertheless found that relevant customary law imposes on the United States most of the same standards pertaining to the use of force as are embodied in those Charters.⁷

Having held that the Vandenberg reservation does not bar the Court from deciding the case because the merits could be determined by reference not to treaties but to customary law,⁸ the Court then directed its research to the content of that customary law. It examined states' "actual practice and *opinio juris*"⁹ and dutifully cautioned that *opinio juris* should be "confirmed by practice."¹⁰ But the judges also held that "*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions."¹¹ What does the Court mean by "attitude"? The illustrative example given by the judges was Assembly Resolution 2625 (XXV), the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. "The effect of consent to the text of such resolutions," they said,

cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law¹²

The "attitude" of states to a rule of law, it seems, may be determined by their voting behavior in the General Assembly.

Although this statement was not, strictly, necessary to the outcome,¹³ it will probably, over the long run, overshadow the impact of the core decision itself. In the Court's view, voting for a norm-declaring resolution is an exercise in *opinio juris*. What of the need to test *opinio juris* against state conduct, as, for example, in respect of the principle of the nonuse of force? While

⁷ *Id.* at 93-95, paras. 175-77.

⁸ *Id.* at 38, para. 56, and 97, para. 182.

⁹ *Id.* at 97, para. 183.

¹⁰ *Id.* at 98, para. 184.

¹¹ *Id.* at 99-100, para. 188.

¹² *Id.* at 100.

¹³ The Court could have proceeded solely on violations of the customary law rule of proportionality, violations of the Treaty of Friendship, Commerce and Navigation and violations of customary rules of humanitarian and maritime law.

the majority opinion conceded that "examples of trespass against this principle are not infrequent," it still concluded that the rule nevertheless "is part and parcel of customary international law."¹⁴ Why? The Court speaks vaguely of the existence of *opinio juris* and "substantial practice"¹⁵—but adds nothing more specific. Yet *opinio juris* is *not* evidence of practice, unless the verbal behavior of states in the Assembly is to be presumed to attest to their actual behavior in the "real world."

Traditionally, a normative principle has been thought to enter into customary law only after being confirmed by practice, that is, after it is demonstrably adhered to by the actual conduct of the large preponderance of international actors capable of violating it. The customary norms cited by the Court are adhered to, at best, only by some states, in some instances, and have been ignored, alas, with impunity in at least two hundred instances of military conflict since the end of World War II.

The effect of this enlarged concept of the lawmaking force of General Assembly resolutions may well be to caution states to vote against "aspirational" instruments if they do not intend to embrace them totally and at once, regardless of circumstance. That would be unfortunate. Aspirational resolutions have long occupied, however uncomfortably, a twilight zone between "hard" treaty law and the normative void. Even if passed with a degree of cynicism, they still may have a bearing on the direction of normative evolution. By seeking to harden this "soft" law prematurely, however, the Court advises prudent states to vote against such resolutions, or at least to abstain.

The most important part of the opinion, and the most troubling, is the Court's interpretation of the rights of states to act in collective self-defense under Article 51 of the UN Charter. Strictly speaking, this is not a necessary part of the Court's decision. Once the majority of judges had found no compelling evidence of intentional involvement by the Nicaraguan Government in the direction and supplying of Marxist forces seeking to overthrow the Government of El Salvador, it was practically inevitable that certain verified—indeed, some factually uncontested—activities of the United States would be found unlawful. The U.S. defense had been based primarily on an allegation of law, not of fact: that Washington's activities in the region constituted an exercise of the right of collective self-defense. The Nicaraguan rejoinder, by contrast, was based essentially on an allegation of fact: that the Sandinistas were doing nothing unlawful against neighboring regimes. After that Nicaraguan assertion was accepted by the Court, the U.S. assertion of a right of self-defense need not have been examined at all. Yet the Court chose to take it up, and thereby made some of its most important and controversial pronouncements. While accepting the Nicaraguan position that no intentional aid was being given to rebels in El Salvador, the Court went on to speculate that *even if* such help were being provided, no right of collective self-defense would accrue to the United States.

¹⁴ 1986 ICJ REP. at 106, para. 202.

¹⁵ *Id.*

The Court asked: If Nicaragua has been giving support to the armed opposition in El Salvador, does this constitute an armed attack authorizing the United States to give support to the armed opposition in Nicaragua as an act of collective self-defense of El Salvador?¹⁶ It answered this in the negative. "In the case of individual self-defence," the opinion declares, "the exercise of this right is subject to the State concerned having been the victim of an armed attack." A fortiori, the same requirement applies to the exercise of collective self-defense.¹⁷ No one had asserted that El Salvador was the victim of an "armed attack," which, the Court asserted, must involve the sending of regular, or irregular, armed forces across international boundaries but does not include "assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States,"¹⁸ but it may not be regarded as an armed attack.

Thus, the Court was able to conclude that "under international law in force today—whether customary international law or that of the United Nations system—States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack'."¹⁹ In the majority's view, "only when the wrongful act provoking the response was an armed attack,"²⁰ i.e., something reaching the threshold of the dispatch of armed bands "on a significant scale,"²¹ may the United States go to the aid of an El Salvador by giving aid to an insurgency in a Nicaragua. This seemingly rigid barrier is slightly dented by a vague assertion that there may, in undefined circumstances, be "some right analogous to the right of collective self-defence"²² against a level of intervention falling short of an actual "armed attack."

The consequence of this substantive rule appears to be that fire may be fought with water, but not with fire. It is a proposition that leaves victimized states little option but to confine countermeasures to their own territory, where, it appears, they may secure the aid of friendly states in dealing with insurgents.²³ They are not, however, allowed to strike back at the base camps, the source of their troubles, in the states sponsoring proxy civil war, at least not until the intervention reaches the "armed attack" threshold defined by the Court. Source states get a free ride, legally invulnerable to individual or collective response against their own territory, even if the insurgency is planned, trained, armed and directed from there.

¹⁶ *Id.* at 70–71, para. 127. This is a paraphrase of the Court's hypothetical statement of the norm as urged by the United States.

¹⁷ *Id.* at 103–04, para. 195.

¹⁸ *Id.* at 104.

¹⁹ *Id.* at 110, para. 211.

²⁰ *Id.*

²¹ *Id.* at 104, para. 195. See also *id.* at 199, paras. 229–30, and at 127, para. 249.

²² *Id.* at 110, para. 210.

²³ The Court makes clear its position on what has long been the subject of controversy among scholars: the right to intervene in civil strife. The majority confirmed that there is no "general right of intervention, in support of an opposition within another State." *Id.* at 109, para. 209. Thus, in civil strife, "intervention is allowable at the request of a government of a State" while not allowable "at the request of the opposition." *Id.* at 126, para. 246. Legal historians still debating the rights and wrongs of the Vietnam War will be more than a little interested in this mildly surprising clarification.

Given the nature of proliferating proxy wars and international terrorist networks, it is inconceivable that the United States will agree to go along with such a grant of immunity. Such a refusal inevitably means that Washington will not revive its terminated acceptance of the Court's compulsory jurisdiction, not, at least, without an "armed conflict" reservation of the kind found in the Indian and Kenyan acceptances. Indeed, such a clause should have been part of the U.S. acceptance long ago.

There is much else in the Judgment that is of importance. Scholars and students will mine the rich veins of *obiter dicta* for decades. The overall impression of the Judgment, however, is that it will have unfavorable implications for the rule of law, at least in the short run. If the majority judges were determined to hold the United States accountable, a more modest Judgment, along the lines indicated by Sir Robert Jennings, might have served them better.

THOMAS M. FRANCK*

PROTECTING THE COURT'S INSTITUTIONAL INTERESTS: WHY NOT THE *MARBURY* APPROACH?

A wise prince must rely on what is in his power and not on what is in
the power of others.

Machiavelli

The International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua* confronted a dilemma that paralleled in many ways the one confronted by the United States Supreme Court in the famous 1803 case of *Marbury v. Madison*.¹ Each dispute confronted a young court that had not yet established its legitimacy; each court faced a powerful, recalcitrant defendant that challenged its right to decide the case; and each therefore seemed to face two equally unpalatable choices: avoiding the case and seeming to admit defeat, or resolving it only to have the judgment ignored. Either choice seemed to entail profound damage not only for the court as an institution but also for the legal system in which it operated.

Chief Justice John Marshall's cunning decision in *Marbury* saved the United States Supreme Court. Ultimately, the decision enhanced its power, laying the groundwork for the establishment of judicial supremacy. By contrast, the International Court's decision in the *Nicaragua* case may have doomed it to a role of inconsequence in international dispute resolution. The International Court could have employed Marshall's approach; had it done so, its future could be far brighter.

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¹ 5 U.S. (1 Cranch) 137 (1803).

In 1803 the Supreme Court had not yet secured its position as final arbiter of the meaning of the U.S. Constitution. Whether the Supreme Court could bind the political branches with its reading of the Constitution was still hotly debated. The Constitution made no provision for judicial review of legislative or executive acts; it was then unclear whether an act in violation of the Constitution remained valid, and also unclear which branch had the "last word" in its interpretation.

Against this backdrop, William Marbury brought an action asking the Court to issue a writ of mandamus ordering President Jefferson's Secretary of State, James Madison, to deliver Marbury's judicial commission. Because he had been appointed to the bench by President John Adams, Marbury argued, and because his commission had been signed and sealed, it was unconstitutional for the Jefferson administration to withhold delivery.

Many Jeffersonians were gleeful that their arch-rival, Marshall, seemed cornered. If Marshall ordered Madison to deliver the commission, Madison would almost surely ignore the Supreme Court's order. The Court would be powerless to enforce its directive and a historical precedent of presidential preeminence would be established. The Court would suffer a tremendous loss of prestige. On the other hand, a decision in favor of Madison would be a decision against Marshall's own political party (to which Marbury belonged) and would also represent a victory of the Executive over the judiciary. This seemed equally unthinkable. Marshall, and the Supreme Court, seemed to have no way out.

But the Court escaped. The Court, Marshall wrote, lacked jurisdiction to decide the case. The reason: the act of Congress that purported to confer jurisdiction was unconstitutional—and it was the task of the Supreme Court to declare it so. The decision was a consummate political gambit: at the cost of taking one small step backwards, through the abnegation of jurisdiction, Marshall took one huge step forward. *Marbury* established for all time that the Court has the final say on what the United States Constitution means. Through nimble political one-upmanship, the Supreme Court laid the cornerstone for the doctrine of judicial review. Marshall also accomplished his short-term political objective of shaming the Jefferson administration, delivering dicta that excoriated it for withholding Marbury's commission.

THE TASK THAT CONFRONTED THE INTERNATIONAL COURT

In 1986 the International Court of Justice, like the U.S. Supreme Court of 1803, faced the task of establishing its bona fides as the supreme expositor of its legal system. In *Military and Paramilitary Activities in and against Nicaragua*, the Court had to accomplish three objectives to protect its institutional interests.

First, the International Court had to indicate its belief that the United States, in certain of its actions against Nicaragua, had violated international law. In light of the egregiousness of the violations, to fail to do so would have removed any possible role for the Court as a credible adjudicator of

future international disputes. It would have appeared as though the Court had pulled punches out of fear of the United States.

Second, the Court had to establish its authority vis-à-vis the United States. This required an actual exercise of power. Merely to write an essay on principles of international law pertaining to the use of force, letting the parties and various observers apply the Court's abstractions to the facts, would be to render itself feckless in the eyes of world opinion.

Third, the Court needed to carry out this exercise of power in a manner that the United States could not disregard. The Court's act, in other words, needed to be "untrumpable." International law would suffer a grievous blow if a solemn prohibition of its highest tribunal could be dismissed as so much smoke. Given the U.S. nonappearance in the merits phase of the proceedings and the disparagement of the Court by executive branch officials, it was entirely predictable that the United States would disregard the Court's final judgment—which made this third goal the hardest to achieve.

In sum, the Court had somehow to penalize the United States.

The Court accomplished the first objective. The Court also achieved the second goal: the opinion is a specific, authoritative directive. But the Court failed completely to attain the third objective: the United States ignored the Court's order. Because the United States succeeded in that violation, the Court ended up squandering much-needed political capital. Moreover, the "deniers" of international law (to use Judge Lachs's apt word²) were given new ammunition. It looked more and more as though a tribunal with no bite were expounding a legal system with no bark.

It need not have been this way. The International Court could have achieved all three objectives, just as the U.S. Supreme Court did in 1803. The International Court could have done so in the same way Chief Justice Marshall did—by declaring the jurisdictional base invalid after a searing condemnation of the conduct at issue. Indeed, the conceptual foundation for such an approach had already been laid in two widely praised opinions of Judge Sir Hersch Lauterpacht arguing that a state's acceptance of the Court's compulsory jurisdiction is invalid if the declaration reserves to that state the right to judge the Court's jurisdiction.

In a separate opinion in *Certain Norwegian Loans*,³ Judge Lauterpacht considered the validity of the French Declaration accepting the International Court's compulsory jurisdiction subject to a "self-judging" reservation. The reservation excluded from the jurisdiction of the Court "matters which are essentially within the national jurisdiction as understood by the Government of the French Republic."⁴ Judge Lauterpacht viewed the reservation as contrary to Article 36, paragraph 6 of the Statute of the Court, which provides that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by a decision of the Court."⁵ If a dispute were to

² Lachs, *The Development and General Trends of International Law in Our Time*, 169 RECUEIL DES COURS 11, 253 (1980 IV).

³ Case of *Certain Norwegian Loans* (Fr. v. Nor.), 1957 ICJ REP. 9 (Judgment of July 6).

⁴ *Id.* at 34 (Lauterpacht, J., sep. op.).

⁵ Statute of the International Court of Justice, 59 Stat. 1055 (1945), TS No. 993.

arise between the parties as to whether the Court had jurisdiction, he wrote, the French reservation would empower the French Government, rather than the Court, to decide whether the Court had jurisdiction. This would violate not only the Statute of the Court, but "one of the most fundamental principles of international—and national—jurisprudence according to which it is inherent in the power of a tribunal to interpret the text establishing its jurisdiction."⁶ Judge Lauterpacht therefore concluded that, because the reservation formed an essential part of the French Declaration, the entire Declaration must be treated as "devoid of legal effect and as incapable of providing a basis for the jurisdiction of the Court."⁷

Two years later, the validity of the U.S. self-judging Declaration was at issue in the *Interhandel Case*.⁸ That provision, the "Connally reservation," excluded from the International Court's jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."⁹ In another separate opinion, Judge Lauterpacht reiterated his view that such a reservation rendered the Declaration invalid and that the United States thus ought not to be seen as having accepted the Court's compulsory jurisdiction. (Because it ruled that Switzerland had not exhausted remedies available in U.S. courts, however, the Court had no occasion to pass upon the validity of the Connally reservation.)

ADVANTAGES OF THE *MARBURY* APPROACH

It could have made good sense in the *Nicaragua* case for the International Court to have adopted Judge Lauterpacht's position. The Court could have held that, because of the Connally reservation, the United States had never accepted the Court's compulsory jurisdiction, and that the United States therefore was not subject to suit. Aside from representing a sound view on the merits concerning the validity of the reservation, this approach would have presented a number of political advantages—advantages similar to those that accrued to the *Marbury* Court in 1803.

First, and most important, the approach would have helped establish the legitimacy of the International Court. The Court would have exercised authority over the United States in a manner that the United States could not have disregarded. Meager as it is, the one power that a court *can* exercise without interference is the power to determine that a jurisdictional grant is invalid. There is no practical way to compel a court to hear a case that it does not want to hear, or to prevent it from stating the reason that it will not hear that case. However much the United States Congress might have objected that the *Marbury* Court lacked the authority to invalidate the statutory provision containing the jurisdictional grant, Congress could do nothing to prevent the Supreme Court from pronouncing that jurisdictional grant invalid. However much the United States might have objected that

⁶ 1957 ICJ REP. at 39.

⁷ *Id.* at 66.

⁸ *Interhandel Case* (Switz. v. U.S.), 1959 ICJ REP. 6 (Judgment of Mar. 21).

⁹ 61 Stat. 1218 (1947).

the International Court lacked the authority to invalidate the 1946 Declaration containing the grant of compulsory jurisdiction, the United States could do nothing to prevent the Court from pronouncing that jurisdictional grant invalid. To refuse to decide a case, and to say why, is the one "un-trumpable" act available to a court.

Second, to decline jurisdiction in this manner would have beaten the United States to the punch. It was evident to many observers after the United States modified its Declaration in 1984¹⁰ that the United States was not long for this Court. And it took little prescience to see that the U.S. withdrawal would involve repudiation of the Court. Let there be no suggestion that anything less occurred: the United States boycotted the proceedings on the merits, terminated its 1946 Declaration and did so amid reckless rhetoric casting aspersions on the integrity of some of the world's most distinguished jurists—all the while in flagrant violation of its treaty obligation to comply with the Court's decision.¹¹ To have invalidated the United States Declaration before the United States itself had the chance to do so would have been to the Court's political advantage.

Third, the United States Government might have been chastened by being ousted, or the ouster might at least have engendered some sober reflection by the American people about where this administration is taking them. The United States has—or had—long liked to think of itself as one of the most enthusiastic supporters of international adjudication.¹² At the turn of the century, American statesmen were at the forefront of efforts to establish an international tribunal of broad authority.¹³ The U.S. withdrawal from the Court's compulsory jurisdiction received little press attention; few Americans realize how radically the United States has departed from long-standing tradition. To be thrown out of the Court just might have been the splash of ice water needed to bring the United States Government to its senses.

Fourth, the United States in this century has gotten into a bad habit of entering into treaties by accepting their form but not their substance.¹⁴ It approved the Kellogg-Briand Peace Pact—subject to the Monroe Doctrine.¹⁵ It entered into seven mutual security treaties that pledged American help to 25 states in the event of an attack—provided the United States decided

¹⁰ See generally Glennon, *Nicaragua v. United States: Constitutionality of U.S. Modification of ICJ Jurisdiction*, 79 AJIL 682 (1985).

¹¹ Art 94(1) of the United Nations Charter, 59 Stat. 1031, TS No. 993, provides that "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

¹² See generally T. FRANCK, *JUDGING THE WORLD COURT* (1986).

¹³ See *id.* at 17-19.

¹⁴ The administration of President Theodore Roosevelt negotiated several treaties obliging the parties to use the Permanent Court of Arbitration to settle treaty disputes, but the Senate insisted that the President make further special agreements subject to Senate consent. Roosevelt withdrew the Senate-amended treaties, describing them as "nonsense." "I wish either to take part in something that means something," he said, "or else not to have any part in it at all." *Id.* at 18.

¹⁵ See Lachs, *supra* note 2, at 157.

to help.¹⁶ It became a party to dozens of treaties of friendship, commerce and navigation—many of which, like the Treaty with Nicaragua, permit each party to take any act it deems “necessary to protect its essential security interests.”¹⁷ Obligations that would be dismissed as illusory in United States domestic courts have become commonplace in the nation’s international affairs. Some diplomatic utility may inhere in such arrangements. In general, however, such undertakings are disingenuous and entail a serious risk of misunderstanding on the part of other treaty members, as well as the American public. Usually, the United States cannot have it both ways; in adhering to an international agreement such as the Statute of the International Court, if the United States wishes to reap the benefits, it should be willing to pay the price.

Fifth, the *Marbury* approach would have cost the Court less political capital than it expended. The Court could still have found the same facts, it could still have applied the same law—it could still have written much the same opinion, except as dicta. It might be objected that a *binding* decision was required, one that directed the United States in operative terms to cease its illegal activities. I would agree—if the Court could have made such an opinion stick. But it could not. It was entirely foreseeable that the United States would disregard the Court’s order. Given the choice between a binding opinion that would be ignored and dicta that could not be, the institutionally desirable path was clear. This was especially so because there would have been little practical difference between the two. From Nicaragua’s standpoint, the short-term value of the Court’s Judgment lay primarily in its political value;¹⁸ it would have made little difference in the court of world opinion that the International Court’s condemnation of the U.S. misuse of force was not a formal holding. In light of the indifference manifested by the United States toward the substantive rules at issue, most observers probably would have been surprised if it *had* complied with the Court’s order. In the long run, the utility of the Judgment derived principally from its value as a bargaining chip in future negotiations with the United States. It might ultimately be useful to Nicaragua to have a “holding” in hand if and when it sits down at the table with the United States to work out their differences, but the value of any judgment at this stage is obviously speculative. So there was little to be lost and much to be gained by taking a cue from John Marshall.

¹⁶ See Glennon, *United States Mutual Security Treaties: The Commitment Myth*, 24 COLUM. J. TRANSNAT’L L. 201 (1986).

¹⁷ Art. XXI, para. 1(d), Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, U.S.-Nicar., 9 UST 449, 465, TIAS No. 4024, 367 UNTS 3.

¹⁸ These comments apply to the utility of the Judgment in the international arena. For an enforcement effort in a domestic tribunal, a holding would be essential. Ironically, while the International Court’s reliance upon customary international law rather than treaty law may not (from Nicaragua’s standpoint) have been the most desirable outcome internationally, it is useful for some domestic enforcement purposes. For example, the jurisdiction of the Court of Claims excludes claims deriving from treaties. See 28 U.S.C. §1491 (1982); Note, *Jurisdiction of Cases Related to Treaties: The Claims Court Treaty Exception*, 26 VA. J. INT’L L. 1 (1986).

OBSTACLES TO THE *MARBURY* APPROACH

Several technical impediments would have had to be overcome for the Court to take the *Marbury* approach, but none was insurmountable.

An alternate jurisdictional base existed in the compromissory clause of the 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States.¹⁹ As the Court noted in its 1984 jurisdictional Judgment, that jurisdiction is narrower in scope than the jurisdiction deriving from the Declarations of the two parties under the optional clause.²⁰ Still, the benefit of the *Marbury* model would have been undercut if the Court found itself confronted with essentially the same legal and political issues. At least two possible solutions were at hand. First, the Court could have disallowed the invocation of this jurisdictional basis on the ground that Nicaragua had failed to specify it in the Application initiating proceedings (it had been invoked for the first time in Nicaragua's subsequent Memorial).²¹ The United States in fact argued, in the jurisdictional phase, that the Court can exercise only that measure of jurisdiction relied upon in the Application, and that the Rules of Court do not allow an applicant to assert in subsequent pleadings jurisdictional grounds of which it was presumably aware at the time it filed its application.²² The Court rejected the argument, but in light of the Court's requirement that jurisdictional bases be specified "as far as possible" in the application,²³ the U.S. contention was not unreasonable and could have served as a means of avoiding substantive issues raised by the Treaty. Second, the Treaty itself, as noted above, contains a provision allowing each party to act as it deems "necessary to protect its essential security interests."²⁴ Judge Schwebel argued in dissent that the *travaux préparatoires* indicated that the parties had intended that matters relating to military security should be seen as falling within the scope of this provision and thus outside the reach of the Treaty; it followed, he wrote, that such matters also lay beyond the Treaty's jurisdictional scope. This rationale, too, could have provided a means of avoiding Treaty-related issues.

Another problem presented by the *Marbury* approach could have been that the United States had been allowed to appear as a petitioner only 4 years earlier in *United States Diplomatic and Consular Staff in Tehran*.²⁵ No objection was raised then by the Court concerning the Connally reservation; to object now could have given rise to further cries of prejudice. Yet the Court itself had never expressly considered the validity of a self-judging

¹⁹ Art. XXIV, para. 2 of the Treaty, *supra* note 17, 9 UST at 467.

²⁰ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392, 426, para. 77 (Judgment of Nov. 26).

²¹ *Id.*

²² *Id.*, para. 78.

²³ Rules of Court, Art. 38, ICJ ACTS AND DOCUMENTS, No. 4 (1978).

²⁴ See note 17 *supra* and accompanying text.

²⁵ United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3 (Judgment of May 24).

reservation. Even if it had, the International Court is not bound by the doctrine of *stare decisis*,²⁶ moreover, the jurisprudence of the U.S. Supreme Court—a tribunal that *does* honor that doctrine—is rife with examples of dissenting opinions that in the fullness of time have come to command the support of a majority.

Finally, bifurcation of the proceedings, with the first stage devoted to jurisdiction and the second to the merits,²⁷ could have posed problems had the Court wished to write an opinion that announced an absence of jurisdiction but then addressed the merits. Arguably, the Court should never have reached the merits had it decided earlier that it lacked jurisdiction by virtue of the invalidity of the Connally reservation. But the Court need not have decided the validity of the Connally reservation at the jurisdictional stage—just as it did not then decide the effect of the multilateral treaty reservation. The reason for not passing upon the effect of the multilateral treaty reservation at the jurisdictional stage, the Court said, was that the reservation was not “exclusively preliminary” in character²⁸ (as required by the Rules of Court²⁹). The Court could have found, for any number of reasons, that questions raised by the Connally reservation also were not “exclusively preliminary.” This would have permitted the Court to write an opinion that discussed the merits—but declined jurisdiction—after hearing arguments on the merits. So the obstacles were not too great to be overcome if the Court had wanted to take the *Marbury* road.

CONCLUSION

That approach could have encouraged the formulation by the United States of a responsible declaration reaccepting the Court's compulsory jurisdiction—one without a new version of the Connally reservation. Attention already has begun to focus on whether the United States should deposit another declaration, and if so, what jurisdictional restrictions it should include. I think that such discussion is premature so long as the United States continues to act in open contempt of its obligation under the United Nations Charter to comply with the Court's decision in this case. I also think that the Court would be on solid ground if it refused to accept another declaration from the United States while its violations of international law continue. No one can or should take seriously a promise to respect the Court's authority if that promise is made by a state currently in breach of its obligation to do precisely that. If a declaration is rendered invalid by a reservation arrogating to the reserving state the power of the Court to judge its own jurisdiction, a fortiori a declaration should be invalid if the declaring state implicitly

²⁶ ICJ Statute, *supra* note 5, Art. 59.

²⁷ The impetus for bifurcated proceedings was provided by *Barcelona Traction, Light & Power Co., Ltd. (New Application)*, 1970 ICJ REP. 4 (Judgment of Feb. 5), in which the Court required the parties to plead the merits and then decided the case on the basis of a preliminary objection. The Court was criticized for imposing an unnecessary and expensive procedure.

²⁸ 1984 ICJ REP. at 425.

²⁹ Rules, *supra* note 23, Art. 79, para. 7.

reserves to itself the power to disregard not merely a jurisdictional finding of the Court but a final judgment as well. In any event, when the day comes that the United States is not in violation of the Court's order, formulation of a new declaration can be considered. Invalidation of the Connally reservation in this case might have lessened the likelihood that a self-judging reservation would be reiterated.

MICHAEL J. GLENNON*

DISCRETION TO DECLINE TO EXERCISE JURISDICTION

The *Nicaragua* case¹ raises anew long-unresolved questions about the circumstances in which the Court may or should decline to exercise its jurisdiction. It is far from self-evident, of course, that in the absence of a specific grant of discretionary authority the Court is entitled to abstain from judging the merits of a contentious case, once it is satisfied that its jurisdiction has been established. Its judgments, however, and some supportive scholarly writings, suggest variously that discretionary authority is inherent in the Court as a judicial institution; that it is to be inferred from language contained in Articles 36 and 38 of the Statute; that it is implicit in the nature of international law or the remedies available to the Court to fashion relief for violations of it; or that unless otherwise indicated it should be deemed implicit in, even coextensive with, express grants of jurisdiction. In this brief survey, I will suggest that as a general rule the discretionary authority of the Court derives principally from the political community's tacit acceptance of the Court's assertions of discretion; that this validation is ambiguous and tenuous, at best; and that it is in the institutional best interests of the Court to justify its exercise of discretion, in each instance, in a more candidly principled way than it has done in the past.

I.

Neither the United Nations Charter nor the Statute of the Court expressly authorizes the Court to decline to consider the merits of a contentious case. In fact, the text of the Statute seems to lend itself to the inference that this authority was withheld deliberately. The absence of any mention of such discretion with respect to contentious cases stands in marked contrast to the discretion expressly granted in Article 65, paragraph 1 with respect to advisory opinions—i.e., that the Court “*may* give an advisory opinion” (emphasis added). Similarly, although perhaps less obviously, Article 38, paragraph 1 emphasizes that the Court's function “*is to decide in accordance with international law such disputes as are submitted to it*” (emphasis added). While it seems clear, especially in light of Article 36, paragraph 6, that the

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¹ Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

phrase "such disputes as are submitted to it" refers only to disputes over which the Court has jurisdiction, it is not clear that its effect is to leave the Court free to decide that a particular claim, or a category of claims of its own choosing, is unsuited for judicial consideration or relief.²

The Court has said that "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore."³ It has spoken of its duty to maintain its "judicial character" and to act as guardian of the Court's "judicial integrity."⁴ Vague and sweeping generalities of this sort tend to be self-serving, however, and to be used to rationalize decisional choices resulting, consciously or not, from unidentified policy considerations. What is more, their uncertain content exposes the Court to the charge that it is disposed to invoke principle to mask expediency, partisanship or indifference to logical consistency.

The Court's reference to inherent institutional limitations is suspect on empirical grounds as well.⁵ Even assuming, against one's professional instincts, that all courts of law invariably enjoy similar inherent discretion, regardless of their formal structure or the political framework or cultural traditions that shape expectations of how they should function, it does not follow that such qualities inhere automatically in as hybrid and altogether idiosyncratic an institution as the World Court. While the Court does partake of some institutional characteristics common to municipal courts, it differs from them in material respects. It is in fact, if not in name, an arbitral body, a legal adviser to international organizations (i.e., by virtue of its discretion to give advisory opinions) and an instrument of UN diplomacy. It does not represent a phase in an adjudicative hierarchy, as most municipal courts do; it lacks any inherent jurisdiction over the members of the community it serves and in practice has no jurisdiction over most of them; and such jurisdiction as it does possess is less the consequence of constitutional or statutory prescription than of contractual grants by the litigants themselves—litigants, again unlike those with whom municipal courts generally deal, that are in all relevant instances sovereign states.

Moreover, while all judicial institutions are subject to shifting preferences among divergent models of the role they should play, most enjoy the benefits, not currently available to the Court, of underlying consensus on basic community values, in particular, of shared conceptions of the rule of law and the role of judges in upholding it. Despite the emphasis in Article 38(1) on

² See *Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)*, 1974 ICJ REP. 253, 321–22 (Judgment of Dec. 20) (Onyeama, Dillard, Jiménez de Aréchaga & Waldock, J. J., dissenting); see also 1 S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 308 (1965).

³ Case concerning the Northern Cameroons (*Cameroon v. UK*), Preliminary Objections, 1963 ICJ REP. 15, 29 (Judgment of Dec. 2); *Nuclear Tests*, 1974 ICJ REP. at 259–60 (quoting *Northern Cameroons*).

⁴ *Northern Cameroons*, 1963 ICJ REP. at 29.

⁵ See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (in which Chief Justice Marshall said: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given"). But see Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. REV. 543 (1985).

deciding disputes, there never has been a substantive consensus on the role the Court should play, and whatever consensus may once have existed with respect to the rule of law in international relations cannot unhesitatingly be said to have survived. Under the circumstances, categorical imperatives about the Court's inherent qualities are bound to appear either as quaint anachronisms or as disguises for unstated policy or outcome preferences.

II.

The Court has sometimes identified the word-concept "dispute" as a source of doctrinal support for an abstention theory, both because Article 38(1) emphasizes that the role of the Court is to decide "disputes" and because the phrase "legal disputes" in Article 36, paragraph 2 of the Statute is thought by some observers to restrictively qualify the enumerated categories of claims to which the Court's compulsory jurisdiction extends. The Court has construed Article 38 to mean that it can exercise its judgment in contentious cases "only when a dispute genuinely exists between the parties."⁶ By implication, at least, it has also read into the words "legal dispute" in Article 36(2) an absolute qualification of its compulsory jurisdiction.⁷ Imputing a technical meaning to "dispute" may be faulted on historical, textual and logical grounds. When the League of Nations first adopted the second paragraph of Article 36, it deliberately chose to describe the disputes it regarded as justiciable in terms of the four enumerated categories, not in terms of the phrase "legal disputes."⁸ The idea that the phrase "legal disputes" represents a deliberate qualification of the four enumerated categories is simply at odds with the original intention. Moreover, the pre-1945 Statute did not even use the word "disputes" in Article 38. That word and the "whose purpose" phrase in which it appears were added, according to the committee that drafted the phrase and recommended its adoption to the San Francisco Conference, merely to accentuate the character of the Court as an organ of international law.⁹ In historical context, the reference seems to be primarily to the syntactic problem referred to by the Permanent Court in the *Serbian Loans* case¹⁰ and, arguably, to the view voiced by many following

⁶ Nuclear Tests, 1974 ICJ REP. at 271.

⁷ Rosenne has suggested that "dispute" is both the nucleus around which the concept "jurisdiction" is constructed and an expression of the object in connection with which the Court is empowered to make a judicial decision having binding force. 1 S. ROSENNE, *supra* note 2, at 292 n.1. Thus viewed, "dispute" seems to be a core concept underlying and transcending all questions of jurisdiction, presumably including that of discretion to abstain from exercising it. For all practical purposes, this transforms "dispute" into a synonym for the always elusive word-concept *justiciability*. But see text accompanying note 8 *infra*.

⁸ This is one of several matters taken up in the present article that I have considered at greater length and from a somewhat different perspective in "Legal Disputes" under Article 36(2) of the Statute, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS (L. F. Damrosch ed. 1987) [hereinafter cited as "Legal Disputes"], as well as, more tentatively, in an earlier article, *Old Orthodoxies amid New Experiences: The South West Africa (Namibia) Litigation and the Uncertain Jurisprudence of the International Court of Justice*, 1 DENVER J. INT'L L. & POL. 65 (1971).

⁹ See Doc. 913, IV/1/74(1), 13 UNCIO Docs. 381, 392 (1945).

¹⁰ 1929 PCIJ, ser. A, No. 20, at 19 (Judgment of July 12).

the Court's advisory opinion in the *Customs Union* case¹¹ that the Court should not be drawn into political controversies. Even if the latter perspective is read into Article 38, the effect would seem to be to urge caution upon those who refer matters to the Court, not, without more, to invest the Court itself with discretion to abstain from deciding cases, or issues, it deems to have touched politically sensitive nerves.

That the Court has sometimes seemed preoccupied with the concept "dispute" is partly coincidental, because its resolution of controversies over Article 36(1) jurisdiction has turned with comparative frequency on construction of compromissory clauses in which the word "dispute" is the principal clue to the parties' intentions. Understandably, respondents have sought to invest the word with as technical a meaning as possible, so as to subject applicants' claims to a restrictive test of suitability to adjudicative relief. The difficulty faced in extending this strategy to construction of the Charter and the Statute is that in these instruments "dispute" is used indiscriminately, in reference to a wide range of international differences, apparently without regard to the intended or likely mode of settlement.¹²

III.

American lawyers, at least, seem prone to analogize the role that "dispute" plays in the jurisdiction of the Court to that which the words "case" and "controversy" play in circumscribing the institutional role of U.S. federal courts. This analogy, too, discounts substantial differences in the texts, historical contexts and institutional frameworks bearing upon the functioning of the Court and U.S. federal courts, respectively. Unlike "dispute" as used in the Charter and the Statute, for instance, "case" and "controversy" occupy a unique place in the U.S. Constitution, being found only in the Judiciary Clause¹³—and relating only to the jurisdiction of the federal courts. The Supreme Court's exploitation of the ambiguity of "case" and "controversy,"

¹¹ 1931 PCIJ, ser. A/B, No. 41 (Advisory Opinion of Sept. 5).

¹² The Charter uses "dispute" in Articles 1, 2, 12, 32-38 and 52, only once in specific reference to matters coming before the Court. The Statute generally uses the word "case" when referring to a matter upon which the Court is called upon to render judgment. Other than in Article 38(1) and Article 36(2), it refers to a "dispute" only in the sixth paragraph of Article 36, when it says that in the event of a "dispute" as to whether the Court has jurisdiction, "the matter" shall be decided by the Court; and in Article 60, when it says that "in the event of a dispute as to the meaning or scope of [a] judgment, the Court shall construe it at the request of any party." Neither reference seems to represent a coded reference to a concept transcending all other aspects of the Court's jurisdiction.

Further evidence of the absence of any intention to invest "dispute" with a technical meaning is provided by the likelihood that in directing the Court to look to certain sources of international law in deciding "such disputes as are submitted to it," Article 38(1) refers not only to a "dispute" submitted pursuant to Article 36(2) and to a "dispute" over the meaning or scope of one of the Court's own judgments pursuant to Article 60, but also to a "case" or a "matter" submitted to it pursuant to Article 36(1), or, for that matter, to a request for an advisory opinion submitted pursuant to Article 65. This is one of the subjects taken up at greater length in "*Legal Disputes*," *supra* note 8.

¹³ U.S. CONST. art. III.

again unlike that associated with technical constructions of "dispute," is rooted in the separation-of-powers doctrine upon which the structure of the government established by the Constitution is based. Neither from its original, libertarian perspective nor from that of the more recently urged managerial model¹⁴ does the "case" or "controversy" analogy seem well suited to the Court. Except to the extent suggested by Article 2, paragraph 7, the UN Charter does not embody the doctrine of separation of powers; it distinguishes among functions, but seldom among the applicable organs and techniques.¹⁵ In any event, exhortations to the Court to avoid usurping the prerogatives of other institutions or processes of dispute settlement are seldom, if ever, cast in terms of effect upon individual liberties or with a view to relieving the Court's docket of a staggering overload.¹⁶

To the extent that the "case" and "controversy" (or "dispute") model speaks the language of comity, of respect for other community institutions, it is capable of speaking with a forked tongue. A decision not to consider a matter otherwise properly before the Court may represent defiance of the will of the parties to adjudicate their dispute, or of that of the political community in establishing legal rules and value objectives. The danger is all the greater when a posture of judicial restraint bespeaks a judicial determination that the legal obligations applicable to a particular dispute are obsolescent or unwise,¹⁷ or when its practical effect is simply to allow the more powerful of the litigant states to prevail.¹⁸

This infidelity applies equally to the oft-cited proposition that the Court should absolve itself of any obligation to entertain "political questions." The nature of the parties entitled to appear before the Court is such that every claim it entertains is bound to have political implications. The Court is not well equipped to measure the political impact of a dispute. Nor should it have to. Unlike most parties to adjudication before domestic tribunals, sovereign states, in accepting the Court's jurisdiction, are free to render any category of dispute nonjusticiable by specifically excluding it from the scope of the jurisdiction to which they consent. If they choose not to avail themselves of this opportunity to prescribe a political standard of justiciability, allowing them a second chance to do so, once a suit has been filed against

¹⁴ See, e.g., Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U.L. REV. 681 (1984).

¹⁵ See *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ REP. 3, 21 (Judgment of May 24); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392, 433-35, paras. 92-95.

¹⁶ It might be argued that respect by the Court for national sovereign prerogatives—e.g., in regard to individual or collective self-defense—has a libertarian objective, in that it increases the likelihood that peaceful democratic states will find ways successfully to resist predatory incursions by hostile, antidemocratic neighbors. The *Nicaragua* case does not seem to have presented ideal circumstances for testing this line of reasoning.

¹⁷ The Judgment of the Court in 1966 in the *South West Africa Cases* may be mentioned in this respect.

¹⁸ Cf. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 114 (1984).

them, is tantamount to allowing the requirement of consent to degenerate into a requirement of double consent, in the form of confirmation of consent previously given.¹⁹ For these reasons, other than as limited by the categories enumerated in Article 36(2), or by the language contained in specific grants of jurisdictional authority, disputes brought to the Court should be presumed to be justiciable, whether they are politically charged or not, if the Court has jurisdiction over them in the specific circumstances presented by the individual suits.

In alluding to the institutional problems created by "political questions," the United States Government wisely avoided drawing too heavily upon either the language or the doctrinal foundations of the several political question doctrines in American constitutional law. It limited itself, in this respect, to narrowly framed contentions that resolution of the issues presented by Nicaragua's complaint is committed by the text of the Charter or by necessary implications from the organizational structure it envisions to the Security Council or to the regional arrangements or agencies contemplated in Article 52. The idea did not sit well with the Court, perhaps not so much because it is unjustified in itself as because it is so redolent of the attitude Hersch Lauterpacht once called *de maximis non curat praetor*, that is, the view that international law is too weak to take cognizance of important issues.²⁰ The Court might well have said, as Lauterpacht did, that such a view is "as abhorrent to the ordinary notions of the function of law as it is unwarranted by the actual content of substantive international law."²¹

IV.

As with the "case" or "controversy" analogy, the inference of a technical content to "dispute" has proven to be practical in justifying judicial discretion to reject a claim as inadmissible by reason of its mootness or lack of ripeness or because the complaining party lacks sufficient interest in the outcome to assure a sharpening of the legal issues or to benefit directly from judicial relief. These principles do not require independent doctrinal support, however, having long been accepted as "general principles of law recognized by civilized nations"—that is, one of the sources of international law Article 38(1) directs the Court to apply.

This is true as well of some equitable principles that have been invoked from time to time in support of judicial abstention—Judge Schwebel's contention, for instance, that the "clean hands" doctrine militated against the Court's acceding to Nicaragua's request. Equitable principles, moreover, show a tendency towards doctrinal overkill, and thus frequently lend themselves to both sides of an argument. To Judge Schwebel's contention, for

¹⁹ See *Aerial Incident of 27 July 1955 (Isr. v. Bulg.)*, 1959 ICJ REP. 127, 142 (Judgment of May 26) (Lauterpacht, Wellington Koo & Spender, JJ., dissenting). Cf. *Anglo-Iranian Oil Co. case (UK v. Iran)* (jurisdiction), 1952 ICJ REP. 93, 154-55 (Levi Carneiro, J., dissenting).

²⁰ H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 168 (1933).

²¹ *Id.* at 170.

example, one might respond that a principle that precludes the Court from promoting the applicant's wrongdoing does not thereby justify promoting the respondent's wrongdoing; that even if the applicant's prior conduct was less than exemplary, it had not worked a hardship on the respondent itself; that the clean hands principle is a substantive defense that has to be specifically pleaded; that the application of the principle is neither required by nor even compatible with the content of the applicable legal rules or, more generally, with rules intended to promote humanitarian objectives; or, finally, that even if the clean hands principle weighed in the respondent's favor, the balance of equitable considerations weighed in the applicant's. Judge Schwebel's learned discourse to the contrary notwithstanding, one might even conclude that, especially as applied to a community of nation-states, the clean hands doctrine is of such uncertain content²² that its invocation in the instant case ill-suited an institution that has been criticized so severely in the past for sacrificing the interests of justice at the altar of power politics.

V.

So brief a survey as this one is bound to leave a great many issues inadequately accounted for. Its purpose, though, is merely to suggest that while the *Nicaragua* case has summoned up a great many propositions in support of discretion in the Court to refrain from exercising its jurisdiction, it has left intact the suspicion that such authority is generally more hoped for than well established and that, if only for this reason, it ought to be invoked sparingly.

EDWARD GORDON*

THE NICARAGUA JUDGMENT AND THE FUTURE OF THE LAW OF FORCE AND SELF-DEFENSE

The most important single consequence of *Nicaragua v. United States of America* may well turn out to be its impact on the vitality of the law of the United Nations Charter governing force and self-defense. Will the case make it more likely, or less, that that law will become an increasingly effective working part of the international system?

In this overridingly important respect, I am afraid the whole episode must be reckoned a misfortune of some magnitude. Explaining why this is so requires, of course, examining the effect of the Court's Judgment on the merits on the content of the specific rules of the law of force and self-defense. Preliminarily, however, we should ask, first, not how the Court left that body of law, after this major venture into the area, but how it found it. And, secondly, in so doing, we should remind ourselves of the nature of the legal and political order of which that regime of law and the Court itself are a part.

²² See generally Z. CHAFEE, *SOME PROBLEMS OF EQUITY* 1-102 (1950).

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What the Court had before it at the outset was a set of broadly formulated principles, laid down in a universally applicable written instrument—the Charter—and carefully, if still incompletely, elaborated in a series of protracted negotiations undertaken in the UN General Assembly in the 1960s and early 1970s with a view to rendering them somewhat more concrete and precise.¹ The notion of international legal restraints on the use of force between states was of course not invented with the UN Charter. But the Charter did radically strengthen it; in so doing, it caught up and carried forward some of the preexisting law—notably the concept of self-defense—but also swept some of it away.

The essence of the Charter principles is that, unless the use of force has been internationally authorized, a state must refrain from using force against other states, except where force is being used against it. In that case, it is free to defend itself with force as best it can, provided only that its response is reasonably proportionate to the injury being forcibly inflicted and, in fact, necessary to put an end to it. The General Assembly's interpretive declarations, among other major contributions, made clear that prohibited "force" encompasses only physical violence and not economic or other forms of coercive conduct; and that it encompasses all forms of such violence, not just conventional open hostilities by a state's military forces, as well as all manner of direct or indirect complicity in it.

Happily, and not by accident, these broad propositions responded reasonably well to the natural imperatives of the political order they had to serve. That order is one in which the main makers and executors of public policy are individual sovereign states, and in which there are many such centers of power. It is true that in a good many areas of international life states have cautiously—and often somewhat successfully—ceded some measure of national prerogative to an international institution, sometimes conferring limited power to make or interpret and apply legal rules even in some technical detail, or to take measures to compel compliance with such rules. But efforts in this direction (mainly in the UN Charter) cannot be said to have succeeded in significant degree as regards regulating the use of force; they either fell short by original design or have not been fulfilled in fact. The Security Council must act by an elusive unanimous consent among major powers; internationally authorized military coercion has proved unworkable; and the Court can act by invitation only, and for the most part has not been invited. Even when, rarely, it is invited, it must address its prescriptions to the same incohesive and polycentric political community that everyone else must deal with, acting through the same curtailed enforcement mechanisms that everyone else must use. No aspect of the political order is transformed just because the Court speaks.

Thus, in precisely that area of the law in which the interests of sovereign states are most fundamental—regulation of the use of force—they are left

¹ These produced the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter (GA Res. 2625 (XXV) (1970)) and the Definition of Aggression (annexed to GA Res. 3314 (XXIX) (1974)).

to rely most directly on primary rules of state conduct, as a legal matter, and on the moral and material resources they can marshal through their own efforts, as a practical matter. They cannot rely on the effective involvement of any public agency to render the general rules more precise by authoritative interpretation as the occasion requires, or on any public enforcing agency to compel compliance.

These primary rules, in order to work, must therefore be readily perceivable, by people bearing the actual responsibilities of government, to reflect the practical requirements of the world in which states must survive and conduct their affairs. It is not enough that they be internally coherent: they must be intrinsically compelling. On their face they must command opprobrium for violation, and make fairly clear that the reciprocal advantages of preserving and respecting them outweigh the costs, whether in short-term gains forgone or risks incurred. They must be readily seen as fundamentally fair. They cannot be full of arcane technicalities or arbitrary distinctions requiring continuous expert exegesis. To stand any chance of surviving the continuous buffeting of self-judging governments, they almost certainly require the relative clarity, strength and stability of the written, contractual word.

To the extent that the primary rules fall short of these standards, and that they significantly deviate in form or content from what I have called the essence of the Charter principles, I suggest that governments will tend to take their constraints less and less seriously in application to their own affairs. This is not because of affection for the UN Charter. It is, rather, because such rules would begin to offend the rough intuitions of responsible politicians—who are concerned for the physical safety of their own countries (and, incidentally, the security of their own governments and careers)—as to what kinds of principles they can live with.

This is the backdrop against which the impact of the *Nicaragua* Judgment on the content and future vitality of that regime of law should be examined.

The Court had put itself into a position that required it to apply exclusively customary international law, largely derivative from the United Nations Charter but nevertheless separate. Its most important conclusions of law relating to force and self-defense were the following:

(1) That the conduct of the United States in “training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua,” where these activities involved the use of force, violated the customary law obligation of the United States not to use force against another state.² The same was true of some seven specified “attacks,” as well as the mining of Nicaraguan waters, which the Court found imputable to the United States.³

(2) That since an “armed attack” is necessary to justify resort to force in self-defense by the United States, the U.S. claim of the right of self-defense

² Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 123 and 146–47, paras. 238 and 292(4), reprinted in 25 ILM 1023 (1986).

³ 1986 ICJ REP. at 123 and 146–47, paras. 238 and 292(4) and (6).

failed because (a) the provision of arms⁴ or "logistical or other support"⁵ to armed forces operating in the territory of another state does not amount to an "armed attack" (and, in any event, such flows of arms from Nicaragua to El Salvadoran territory as had taken place were not imputable to Nicaragua);⁶ and (b) certain "military incursions" or "military attacks" by the Nicaraguan Government into Honduran and Costa Rican territory, while found by the Court to be difficult to appraise legally,⁷ apparently did not amount to "armed attacks."⁸

(3) That although the supply of arms to armed forces within another state's territory, as alleged against Nicaragua, could amount to an unlawful use of force,⁹ and might therefore justify "proportionate countermeasures"¹⁰ even if not—as just indicated—the use of force in "self-defense," such countermeasures could only be taken by the victim state itself, and not by a third state such as the United States acting collectively with it.¹¹ The Court strongly suggested, but so far as I can ascertain did not explicitly assert, that the victim state's "proportionate countermeasures" might themselves include the use of force; ultimately, it found it unnecessary to decide the issue in the present case.¹² But, in any event, a third state would not be entitled to take forcible countermeasures.¹³

Thus, the Court appears to have asserted the following as to the rules of customary international law:

- The prohibition of "force" does indeed prohibit all forms of physical violence, and all kinds of complicity in it, and not just conventional open hostilities by a state's own military forces.

- Only some of these acts of force, however, can be resisted by force in self-defense, no matter how reasonably necessary and proportionate the latter may be, because only some amount to an "armed attack." For example, as a matter of law, the supply of arms to armed bands operating in another state's territory cannot be so resisted—regardless of the gravity of the threat that it actually poses; even some "military attacks" on another state's territory cannot be.

- Some of those unlawful acts of force that cannot be resisted by force in self-defense, however, may be resisted by "proportionate countermeasures" by the victim. It remains an open question whether these countermeasures by the victim state might include acts of force, although the Court strongly suggests that they might. The Court apparently holds that a third state may not participate in *any* such countermeasures. But in no such case may a third state participate in countermeasures involving force, and to do so is a violation of the prohibition on the use of force between states.

⁴ *Id.* at 103–04 and 119, paras. 195 and 230.

⁵ *Id.* at 103–04 and 126–27, paras. 195 and 247.

⁶ *Id.* at 86, para. 160.

⁷ *Id.* at 87, 119–20 and 123, paras. 164, 231 and 238.

⁸ *Id.* at 123 and 127, paras. 238 and 249.

⁹ *Id.* at 103–04 and 126–27, paras. 195 and 247.

¹⁰ *Id.* at 127 and 110, paras. 249 and 210.

¹¹ *Id.* at 110–11 and 127, paras. 211 and 249.

¹² *Id.* at 110, para. 210.

¹³ *Id.* at 127, para. 249.

What are we to make of this? I submit the following:

(1) Any suggestion that there are any acts of unlawful force between states that international law forbids a state from defending against by proportionate force, by the means and to the extent reasonably necessary to protect itself, degrades the concept of international law, and diminishes the inducement for a responsible political leader to take its constraints seriously into account in conflict situations in the actual planning and conduct of that state's affairs.

The Court made this suggestion in several variations. Its logical effect is to require a commander in chief confronted by unlawful force, in order to determine whether or how defensive force may be used, to consult lists reflecting the Court's finely calibrated expert judgment as to what classes of acts are a priori militarily significant, or to call in the Court for such military advice on the spot. No such regime deserves or is remotely likely to command respect. The otherworldliness of such distinctions as the Court put forward (e.g., between organizing and training troops, and providing them armaments, logistical support or other support; between big attacks and little ones) is apparent when one reflects on the actual plight of a victim state: any one of the unlawful acts of force that the Court excluded or might exclude as a basis for self-defense may in fact, given the appropriate circumstances, be as critical to that state's security or even survival as any other. The way to develop a law of force and self-defense that will be taken seriously by real-world states is not to appoint the Court or any other body to such a futile function. It is to do what the Charter already does: permit real force to be resisted by force, but scrupulously require that the defense fit the conduct defended against.

(2) The premise underlying the proposition that some acts of force cannot be resisted by force in self-defense is that, because the language of Article 51 is not identical to that of Article 2(4), some acts of unlawful force are not to be regarded as "armed attacks." That premise is otherwise unsupported by the language of the Charter, and simply imposes its distinctions on the plain language of Article 51, which in no way limits itself to especially large, direct or important armed attacks.¹⁴ The Court itself offered nothing that ameliorates the arbitrariness of its pronouncement. At one point it erroneously invoked, in a surprising misreading, the General Assembly's Definition of Aggression.¹⁵ It spoke from time to time of these excluded

¹⁴ I leave aside the trivial speculation that the Charter drafters intended in Article 51 to exclude barehanded—i.e., unarmed—attacks.

¹⁵ In paragraph 195, 1986 ICJ REP. at 103, the Court cites the Definition of Aggression as evidence of an alleged "general agreement on the nature of the acts which can be treated as constituting armed attacks." If so, the definition leads to a conclusion precisely contrary to the Court's. It is of course a definition not of "armed attack" but of the concept of "aggression," used in the Charter as a basis for invoking the Charter's severest sanctions. But it is relevant to the concepts of "armed attack" and "self-defense" in that it would presumably be absurd to suggest that any act that (according to the definition) the Security Council might properly find to qualify as an "aggression" might not give rise at least to the right of self-defense. This much the Court apparently agrees with. But the Court seems to ignore Articles 2 and 3—the generic definition itself—the effect of which is that *any act of armed force* in violation of the

acts of force as being "of lesser gravity," but on close reading this at least superficially plausible criterion promptly collapses into a muddle.¹⁶

(3) The Court was not free to treat the proposition that some acts of force cannot be resisted by force in self-defense as if writing on a tabula rasa. For it had been considered and specifically rejected by UN member states in the course of protracted negotiations in a sister principal organ of the United Nations. This rejection is a logically essential part of the bargain reflected in one of the basic supplemental instruments on which the Court and both parties in the *Nicaragua* case relied in determining the law of the case, the Definition of Aggression.¹⁷ Without it, there is little reason to think that there would have been any definition in the terms adopted. Moreover, such a rejection is implicit in the Declaration on Friendly Relations. One of the principal reasons for restricting "force" to physical or armed force was the conviction that to enlarge it to include, e.g., economic coercion, as urged by some, would necessarily license the use of force to defend against such conduct.¹⁸

The Court's Judgment on this point was thus not merely unwarranted as a matter of law, but was deeply unwise. For the Court to take the opportunity presented by a particular case to seek to reverse the result of such a process places at peril various valuable things that both it and responsible governments should be seeking to protect. These include the legal authority of its own conclusions and those of the political organs of the United Nations as to the law of the Charter, and, in respect of such matters, the coherence of the UN constitutional system itself. Certainly, it will nurture doubts in the future about whether the laborious and only rarely fruitful process of seeking genuine development of international law through General Assembly declarations is worth the effort.

Charter (not "any armed attack") may constitute an aggression and is *prima facie* to be so regarded (and thus, *a fortiori*, may give rise to a right of self-defense). In Article 3, the definition illustratively enumerates some seven acts that the Council might find to constitute "aggression." But this list is not exhaustive even of acts constituting "aggression" (see Article 4), and certainly not of the broader classes of acts constituting "force" or "armed attack" or justifying the exercise of "self-defense."

¹⁶ First, there is the Court's muted treatment of certain transborder "military attacks" (by *Nicaragua*)—a kind of conduct that the Court presumably considers the gravest form of unlawful force—as nevertheless not constituting armed attacks (1986 ICJ REP. at 87, 119–20 and 123, paras. 164, 231 and 238). This unexplained conclusion presumably must rest on the logically impossible proposition that, being of small consequence in the Court's view, these particular attacks have somehow ceased to be attacks at all; or it must assume some undisclosed distinction between a "military" attack and an armed one. Then, the Court renders the criterion of "lesser gravity" completely vacuous by its holding as a matter of law that the supply of arms or logistical support to armed forces operating in another's territory *cannot* be an "armed attack," no matter, apparently, how grave in practical effect (*id.* at 103–04, 119 and 126–27, paras. 195, 230 and 247).

¹⁷ These facts are set out and the point forcefully argued by Judge Schwebel in his dissent, *id.* at 341–45, paras. 162–68.

¹⁸ See Rosenstock, *The Declaration of Principles of International Law concerning Friendly Relations: A Survey*, 65 AJIL 713, 724–25 (1971).

For the legal situation resulting from the Court's pronouncement is one in which there are now on record what may be regarded as two equally authoritative views within the UN system on a point of Charter law of basic importance. The power of the General Assembly and the Security Council to interpret the Charter for themselves, insofar as it bears on their own domains of responsibility, is clear from the Charter's drafting history, an unavoidable implication of the fact that both organs, composed of sovereign states, are empowered to do things that necessarily entail judgments from time to time on what the Charter means.¹⁹ Unless they are to come to the Court for advice on every such occasion—which they are not required and have shown little inclination to do—they will make their own judgments, which only wisdom and restraint on all sides will prevent from diverging and throwing the meaning of the Charter into confusion. This anomaly is a weakness that has always lurked in the UN system, occasionally threatening to emerge. The Court's Judgment brings it sharply out.²⁰

(4) The further details of the Court's pronouncement compound the injury. For as indicated earlier, either the Court was saying (a) that there are some acts of force that nobody, not even the victim, may resist by proportionate measures of force; or it was saying (b) that the victim may resist by force, provided it does so alone. There is little to be said in explanation of the latter position other than that it is simply a second arbitrary announcement of the Court, stacked on the first: one is at a loss to find any basis in the language of the Charter, or in the experience of states—weak or strong—for concluding that *legally* some acts of force must be fended off alone, while others can be resisted with the help of one's friends. The "collective" aspect of the right of self-defense is not, as the Court seems to have assumed, a sort of superficial adornment pasted onto the basic right by the Charter, which can be harmlessly removed in special cases. Rather, it is a consequence of the fact that states are sovereign legal persons, and can lawfully do in concert what they can lawfully do alone. The Charter merely makes that principle explicit.

In either case above, the Court would cripple the right of self-defense, the more so in the former than the latter.²¹ But in the latter case, it would in one remarkable stroke manage both to impair the right of self-defense,

¹⁹ Report of the Rapporteur of Committee IV/2, as approved by the Committee, Doc. 933, IV/2/42 (2), 13 UNCIO Docs. 703, 709 (1945).

²⁰ Commenting on possible ways to resolve conflicting interpretations among UN organs, the drafters observed, presciently but with an innocent optimism that has a somewhat forlorn ring in 1986:

It is to be understood, of course, that if an interpretation made by any organ of the Organization . . . is not generally acceptable it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment.

Id. at 710.

²¹ The obvious practical consequences of the latter are explored by Judge Schwebel in his dissent, 1986 ICJ REP. at 350, para. 177.

and to weaken fundamentally the *prohibition* on the use of force by creating an open-ended and wholly new category of exceptions to Article 2(4) of the Charter, of unknown content and limit. Where, previously, unilateral force could be lawful only if in self-defense, now it would be lawful also if it qualified as a forcible "countermeasure." This concept (like the sudden shrinkage of "collective self-defense" which preceded it) seems to have been developed on the spot to accommodate the circumstances of the *Nicaragua* case, and is one that is clearly in conflict with the Charter and corrosive of its restraints on the use of force.

(5) The tentative invention of this new exception to Article 2(4)—"forcible countermeasures"—is perhaps only the most obvious specific consequence of the Court's treatment of customary law as the law of the case. In general, the Court did not—as it could well have done—find customary law on matters of force and self-defense to be just a ghostly replica of the Charter, conveniently available to do the same jobs as the Charter when for technical reasons the Charter could not be employed. Instead, customary law was discovered to be a separate and different realm, waiting to be charted by the Court, resembling the Charter in important respects but containing other features that differ from the Charter and could not have been predicted from a reading of it.²²

Thus, in its zeal to meet the exigencies of the *Nicaragua* case, the Court gratuitously cut off the already beleaguered law of force and self-defense from whatever clarity and stability go with the written word of the Charter and the body of treaty law that supports it. This fact is potentially at least as important as the specific, surprising discoveries about customary law that the Court announced, relating to collective self-defense, armed attack and forcible "countermeasures." For the Court will be taken to have issued an invitation to others to venture into this rich realm for themselves, an invitation reinforced by the highly conclusionary nature of much of its own reasoning. It requires no very shrewd reading of the history of the Charter since 1945 to predict that most of these venturers will be governments, with their accompanying scholarly retinues, seeking new ways to justify their forcible conduct by finding still more exceptions to the prohibition on the threat or use of force. The beginnings of a catalog of such possible justifications—some ancient, some modern—have long been discernible: preemptive self-protection, humanitarian concern, ideological or ethnic solidarity, protection of nationals or economic interest, retribution, reestablishment of agreed constitutional arrangements and others—some of which can be reasonably accommodated by the concept of self-defense, but some of which simply cannot.²³

²² See, in particular, 1986 ICJ REP. at 94, para. 176.

²³ It might be argued that, if given the chance, the Court could safely contain within the Charter scheme its own tentative contribution to this catalog: "forcible countermeasures," since it would involve only mini-force in response to mini-attacks, could be subjected to the requirements of necessity and proportionality, and the like. The problem, however, is that the Court is not very likely to be given the chance; the natural tendency of governments is likely

(6) The cumulative effect of all the foregoing is that the law of force and self-defense as it emerges from the Court has become highly arbitrary, intricate and technical, but at the same time more uncertain. At the hands of the Court, it is made to read, in form and logic, more like a somewhat erratically drafted revenue code than a set of great constitutional principles. For these reasons alone it has lost much of its comprehensibility and inherent persuasiveness, and seems to assume a supporting apparatus of interpretation and enforcement and, indeed, a whole political order that do not and will not exist.

* * * *

The Court should simply have stuck to the Charter: if Nicaragua used unlawful force, it should be held accountable, and the victim and any other state acting in concert with it held entitled to defend against that conduct with proportionate force to the extent necessary to put an end to it. If the United States used more force than was reasonably necessary for that purpose, or was not really acting in concert with a victim state, it acted unlawfully and should be held accountable. If the Court for whatever reason could not or did not obtain adequate evidence to make a responsible determination of this grave issue between sovereign states, it should have declined to determine it.

The Court chose to proceed otherwise, and despite the difficulties of the circumstances, not altogether of its own making, that choice was its own. It has left the law of force and self-defense a feeble, poorer thing than it found it: not just more poorly crafted, but, far more importantly, with weakened prospects for actual relevance to international life.

This may seem uncharitable to those who judge that the Court has strengthened the law, by sending an unmistakable message that it will stand up even to a superpower when it finds it in the wrong. But it is not the business of courts to send messages or stand up to litigants (and to imply that the Court acted or would be justified in acting with any such intention would impute to it a judicially unworthy act). The business of courts is to apply the law and preserve the integrity of the legal order, without regard to any perceptions of the relative power or moral purity of the parties. Just doing that well will be message enough. Failing to do so will send a message that in due course will drown out all others.

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to be toward expansion, not containment; and the principle that unilateral force can be used only in self-defense will have been irreparably breached in any event by this unnecessary and obfuscating step.

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SOMBER REFLECTIONS ON THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT

The *Military and Paramilitary Activities* case¹ deepens the gloom already surrounding the two forms of the International Court's compulsory jurisdiction. Neither Article 36(2) of the ICJ Statute, which confers general compulsory jurisdiction upon the Court in cases of reciprocal state declarations, nor that part of Article 36(1) which vests jurisdiction when treaties so provide² has been particularly successful in recent practice. No one denies that the ICJ has served a useful, if occasional, role when it has heard and decided cases voluntarily submitted by then-willing states pursuant to the specially conferred provision of Article 36(1). What is in question is the utility of the all too many recent cases where the Court has taken jurisdiction pursuant to the compulsory provisions of its Statute and then has been, to one degree or another, disregarded.

Since 1966, when the ICJ did a volte-face and declined to decide the *South West Africa* case,³ a moment Professor Leo Gross thought the "nadir" of the Court's fortunes,⁴ the ICJ has been considerably more courageous. However, its courage, at least in compulsory jurisdiction cases, has been shown in the face of considerable opposition by states. In the 1970s and 1980s, the Court's compulsory jurisdiction cases have been beset with nonappearing defendants: Iceland in the *Fisheries Jurisdiction* cases,⁵ France in the *Nuclear Tests Cases*,⁶ Turkey in the *Aegean Sea Continental Shelf* case,⁷ Iran in the *Diplomatic and Consular Staff* case,⁸ and now the United States in the merits phase of the *Military and Paramilitary Activities* case.⁹

Albeit Article 94(1) of the Charter of the United Nations obliges every state "to comply with the decision of the International Court of Justice in any case to which it is a party,"¹⁰ in practice since 1945 states haled into the ICJ by way of compulsory jurisdiction too often have failed to obey adverse court rulings. Albania refused to pay reparations to Great Britain in *Corfu Channel*,¹¹ Iran disregarded the Court's order to refrain from nationalizing

¹ *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

² Statute of the International Court of Justice, 59 Stat. 1055 (1945), TS No. 993, Art. 36.

³ *South West Africa* (Ethiopia v. S. Afr.; Liberia v. S. Afr.) (Second Phase), 1966 ICJ REP. 6 (Judgment of July 18).

⁴ Gross, *Conclusions*, in 2 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 727, 747 (L. Gross ed. 1976).

⁵ *Fisheries Jurisdiction* (UK v. Ice.; FRG v. Ice.), Interim Protection, 1972 ICJ REP. 12, 30 (Orders of Aug. 17); Jurisdiction of the Court, 1973 ICJ REP. 3, 49 (Judgments of Feb. 2); Merits, 1974 ICJ REP. 3, 175 (Judgments of July 24).

⁶ *Nuclear Tests* (Austl. v. Fr.; NZ v. Fr.), 1974 ICJ REP. 253, 457 (Judgments of Dec. 20).

⁷ *Aegean Sea Continental Shelf* (Greece v. Turk.), 1978 ICJ REP. 3 (Judgment of Dec. 19).

⁸ *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ REP. 7 (Order of Dec. 15); 1980 ICJ REP. 3 (Judgment of May 24).

⁹ 1986 ICJ REP. 14.

¹⁰ UN CHARTER, 59 Stat. 1031 (1945), TS No. 993, art. 94(1).

¹¹ *Corfu Channel* (UK v. Alb.), Merits, 1949 ICJ REP. 4 (Judgment of Apr. 9).

a British corporation pending a final judgment of the Court or agreement between the parties in *Anglo-Iranian Oil Co.*,¹² Iceland refused to obey an order not to enforce a 50-mile fishing zone until the Court ruled on suits brought by West Germany and the United Kingdom in *Fisheries Jurisdiction*,¹³ Iran rejected the Court's Order and Judgment that it release the American hostages in *Diplomatic and Consular Staff*,¹⁴ and the United States has now declared that it will ignore the Court's ruling in *Military and Paramilitary Activities*.¹⁵ There is always the theoretical possibility of enforcing an ICJ judgment against a recalcitrant state by having the Security Council take action,¹⁶ but in practice this has not occurred.¹⁷ What gain is there in disregarded compulsory jurisdiction cases?

Almost three decades ago, Sir Hersch Lauterpacht concluded that the Court was much more useful as a vehicle for developing the rules of international law than it was as a means of maintaining international peace.¹⁸ Certainly, there is grist for many legal mills in the language of even ineffective compulsory jurisdiction cases, *Military and Paramilitary Activities* being no exception. The majority opinion alone has new and very illuminating language about, inter alia, nonappearing parties,¹⁹ the proof of facts in international law,²⁰ the relationship of treaty law and customary international law,²¹ and aggression and self-defense.²²

There may also be some public relations value in otherwise ineffective compulsory jurisdiction cases. The United States, for example, sought to use the *Diplomatic and Consular Staff* case as a means of maintaining "support for the American position by the vast majority of nations on earth,"²³ although it is doubtful the ICJ was ultimately so useful in freeing the hostages as were the economic sanctions taken against Iran.²⁴ In the *Military and Paramilitary Activities* case, it is far too early to tell whether Nicaragua will

¹² *Anglo-Iranian Oil Co. (UK v. Iran)*, Interim Protection, 1951 ICJ REP. 89 (Order of July 5).

¹³ 1972 ICJ REP. 12, 30.

¹⁴ 1979 ICJ REP. 7; 1980 ICJ REP. 3.

¹⁵ 1986 ICJ REP. 14; see *The Times* (London), June 28, 1986, at 1.

¹⁶ UN CHARTER, *supra* note 10, art. 94(2), which reads in full:

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

¹⁷ In *Diplomatic and Consular Staff*, before the Judgment came down, the Soviet Union had already vetoed a U.S. proposal to the Security Council to impose an economic boycott against Iran. There were 10 votes in favor, 2 against, 2 abstentions and 1 not voting. UN Doc. S/PV.2191/Add.1, at 54-55 (1980). The United States never asked the Security Council to enforce the Court's Judgment. In the *Military and Paramilitary* case, the United States vetoed Security Council action.

¹⁸ H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 4-5 (1958).

¹⁹ 1986 ICJ REP. at 23-26, paras. 26-31.

²⁰ *Id.* at 38-45, paras. 57-74.

²¹ *Id.* at 92-97, paras. 172-82.

²² *Id.* at 97-117, paras. 183-225.

²³ President Carter, Address of Jan. 8, 1980, DEP'T ST. BULL., March 1980, No. 2036, at 33.

²⁴ See Janis, *The Role of the International Court in the Hostages Crisis*, 13 CONN. L. REV. 263 (1981).

be any more successful in its attempt to use the Court's Judgment to sway public opinion in the United States and in other states.²⁵

Against such gains must be weighed the loss in respect for the ICJ when it acts like a court in name but not in deed. These cases of compulsory jurisdiction display the Court in its weakest and least effectual role. In these circumstances, the ICJ does not truly adjudicate disputes, if "adjudication" has anything to do with a decision that actually settles a matter.

Plainly, much of the blame for the loss in respect for the Court rests on the shoulders of noncomplying defendant states that are failing to observe Article 94(1) of the Charter. Some fault, too, lies with applicant states that use the Court as a public forum when they know that the ICJ has little practical chance of effectively resolving a dispute. Realistically, it may be time for us to recognize that, given the present context of world politics, the compulsory jurisdiction provisions of the ICJ Statute are simply over-optimistic and that the surer and better role for the Court is in the adjudication of cases jointly submitted by willing states. It may be time, too, for the ICJ to contemplate a strategic retreat and in cases of compulsory jurisdiction to be willing to contemplate a doctrine of judicial restraint when it seems unlikely that its decisions will be respected in practice.

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CUSTOM ON A SLIDING SCALE

Every student who has ever taken a traditional international law course has learned Manley Hudson's four elements for the emergence of a rule of customary international law:

- (a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
- (b) continuation or repetition of the practice over a considerable period of time;
- (c) conception that the practice is required by, or consistent with, prevailing international law; and
- (d) general acquiescence in the practice by other States.¹

In the give-and-take of international relations, and in the jurisprudence of the International Court, these elements have been compressed into two: consistent state practice and Hudson's third element, the *opinio juris*.² In

²⁵ For some of the public relations efforts of Nicaragua with respect to the Court's Judgment, see *The Times* (London), July 28, 1986, at 5; and *id.*, July 30, 1986, at 5.

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¹ [1950] 2 Y.B. INT'L L. COMM'N 26, UN Doc. A/CN.4/SER.A/1950/Add.1.

² See especially *North Sea Continental Shelf Cases* (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 41-44 (Judgment of Feb. 20).

Military and Paramilitary Activities in and against Nicaragua,³ the Court has raised the question whether—or at least to what extent—each of these two elements must be established so as to demonstrate that a restrictive rule of customary international law exists.

The Court found a rule of custom coinciding with Article 2(4) of the United Nations Charter, requiring states to refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. In addition, the Court found customary duties on the nonuse of force that are more specific than Article 2(4). This it did without any reference whatsoever to the ways in which governments actually behave. Instead, after noting that both parties accepted the treaty obligation of Article 2(4), the Court focused on the *opinio juris*, which it found primarily in resolutions of the UN and OAS General Assemblies.⁴

In particular, the Court relied on the UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.⁵ This resolution was adopted by consensus and has a distinctly legislative tone, using mandatory language throughout. If the Court had been able to point to consistent state practice buttressing the articulated norms of the declaration, there would be nothing startling about using the declaration to supply the elusive subjective element. In fact, of course, the declaration's norms regarding the nonuse of force and nonintervention are difficult to reconcile with some conspicuous examples of state conduct, including conduct by both parties to this case.

The Court relied on the same declaration, along with other international instruments, to establish the principle of nonintervention.⁶ It did ask in this instance whether practice is sufficiently in conformity with these declarations to result in a rule of custom.⁷ Curiously, it did not attempt to answer its own question. Instead, it defined the principle as a restrictive custom, and examined state practice only to see whether a permissive modification had been established for intervention in support of rebel forces. Even on this point, the Court focused on the lack of proffered legal justification when intervention has occurred in such cases.⁸ In other words, it dealt only with the lack of *opinio juris* for such a permissive course of conduct.

When issues of armed force are involved, it may well be that the need for stability explains an international decision maker's primary reliance on normative words rather than on a combination of words and consistent deeds. In another vital area, human rights, the same thing has happened. The Universal Declaration of Human Rights has come to be regarded as an authoritative articulation of customary international law, at least with respect

³ *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

⁴ *Id.* at 101–02, paras. 191–92.

⁵ GA Res. 2625, 25 UN GAOR Supp. (No. 28) at 121, UN Doc. A/8028 (1970).

⁶ 1986 ICJ REP. at 106–07, paras. 202–04. ⁷ *Id.* at 107–08, para. 205.

⁸ *Id.* at 108–09, paras. 206–08.

to the most fundamental rights, no matter how widespread or persistent the nonconforming state conduct may be.⁹ It is understandable that decision makers would tend to find customary rules in these areas. The alternative would be an international legal order containing ominous silences—where treaty commitments cannot be found—concerning the ways in which states impose their wills on other states or on individuals.

When the stakes are not as high, international decision makers have not been as quick to find restrictive customary rules. The classic example is found in the *North Sea Continental Shelf Cases*,¹⁰ where the Court found neither adequate state practice nor the necessary *opinio juris* to establish the equidistance principle as customary international law for continental shelf delimitation between adjacent states. The *Lotus* case¹¹ is another example. Analogous were the *Fisheries Jurisdiction* cases,¹² where the Court found a permissive custom (in effect, the absence of a restrictive custom) allowing preferential fishing rights for coastal states. The restrictive custom the Court did find—based on high seas fishing rights and therefore inconsistent with extended exclusive fishing rights asserted against longstanding foreign fishing interests—simply drew on well-established state practice and *opinio juris*.¹³

Since the *Nicaragua* case stresses *opinio juris* at the expense of state practice, one should ask whether there is precedent for the converse: a focus on state practice without paying attention to governmental assertions and acquiescences that would establish an *opinio juris*. Eminent writers have long taken the position that from widespread, consistent state practice one may infer a belief that the practice is required or permitted by law, at least if there is little or no evidence of a contrary belief by the relevant actors.¹⁴ This has

⁹ The Declaration has often been cited in subsequent declarations and resolutions. This is evidence of state practice in one sense, but it does not reveal how governments actually act. For discussion of the Declaration's effect as custom, see, e.g., Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 32–37 (B. Ramcharan ed. 1979). In *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 ICJ REP. 3, 42 (Judgment of May 24), the Court treated the fundamental principles in the Universal Declaration as legal norms standing on their own and capable of being applied to state-supported conduct.

Another explanation of the Universal Declaration's normative significance is that it serves as an interpretation and elaboration of the references to human rights in the UN Charter. See, e.g., the official Canadian view in 1980 CANADIAN Y.B. INT'L L. 326.

¹⁰ 1969 ICJ REP. 3.

¹¹ 1927 PCIJ, ser. A, No. 10.

¹² *Fisheries Jurisdiction Case* (UK v. Ice.; FRG v. Ice.), 1974 ICJ REP. 3 and 175 (Judgments of July 25).

¹³ The Court's holding on the merits has been overtaken by subsequent state practice. What is important here is the Court's methodology in a case that involved armed confrontation on only a small scale, between states that were normally allies.

¹⁴ See, e.g., H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 380 (1958); C. PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 62 (1965); I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 8 (3d ed. 1979); Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 25, 69 (1970 I). Cf. C. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 253–54 (1964); C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 441 n.19 (rev. ed. 1968). To the contrary, see Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 32–34 (1974–75).

not been lost on the International Court. In some cases it has given legal significance to consistent state practice, without examining *opinio juris*.¹⁵ This seems inconsistent with *Nicaragua* and the cases stressing the need for an *opinio juris*. The cases can be reconciled, however, if one views the elements of custom not as fixed and mutually exclusive, but as interchangeable along a sliding scale.

On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an *opinio juris* is required. At the other end of the scale, a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.

Exactly how much state practice will substitute for an affirmative showing of an *opinio juris*, and how clear a showing will substitute for consistent behavior, depends on the activity in question and on the reasonableness of the asserted customary rule. It is instructive here to focus on rules that restrict governmental action. The more destabilizing or morally distasteful the activity—for example, the offensive use of force or the deprivation of fundamental human rights—the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable. The converse, of course, will be true as well. If the activity is not so destructive of widely accepted human values, or if the asserted rule seems unreasonable under the circumstances, the decision maker is likely to be more exacting in finding the necessary elements for the rule. A reasonable rule is always more likely to be found reflective of state practice and/or the *opinio juris* than is an unreasonable (for example, a highly restrictive or inflexible) rule.¹⁶

These points may be illustrated by a relatively simple diagram (fig. 1, p. 150). It depicts a sliding scale for establishing a custom that restricts states' freedom of action. The vertical axis measures the frequency of consistent state practice by the relevant actors in any given case. The horizontal axis measures the demonstrated strength of the *opinio juris* in that case. The curves C_1 and C_2 are restrictive custom curves in two paradigm cases: C_1

¹⁵ See *The S.S. Wimbledon*, 1923 PCIJ, ser. A, No. 1, at 25; *Nottebohm Case* (Liechtenstein v. Guat.), Second Phase, 1955 ICJ REP. 4, 22 (Judgment of Apr. 6). See also Dissenting Opinions of Judges Lachs and Sørensen in the *North Sea Continental Shelf Cases*, 1969 ICJ REP. at 218, 231, and 241, 246–47.

¹⁶ See C. JENKS, *supra* note 14, at 254; cf. M. SØRENSEN, *LES SOURCES DU DROIT INTERNATIONAL* 110–11 (1946). This probably explains the readiness of international tribunals to accept, as custom, the major substantive provisions of the Vienna Convention on the Law of Treaties. See Sinclair, *The Vienna Convention on the Law of Treaties: The Consequences of Participation and Nonparticipation*, 78 ASIL PROC. 271, 273 (1984), for a partial list of decisions. Some of the principles set forth in the *Fisheries case* (UK v. Nor.), 1951 ICJ REP. 116 (Judgment of Dec. 18), may also be explained in this way. Examples are the principle that a baseline does not have to follow all the contours of the coast and the factors that determine the validity of straight baselines.

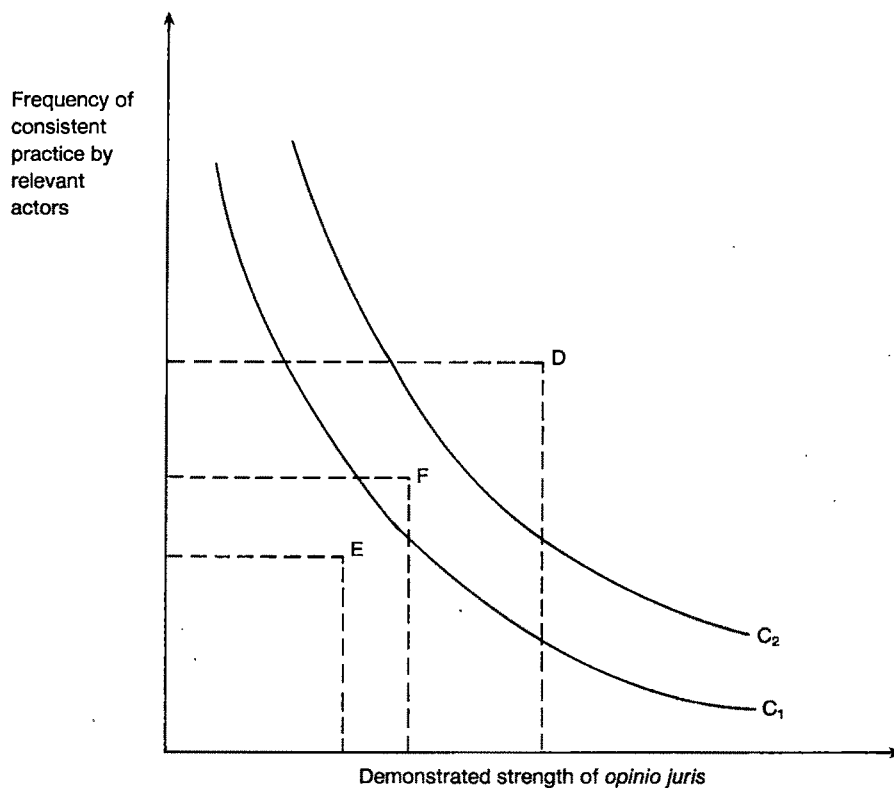


FIGURE 1
RESTRICTIVE CUSTOM CURVE

exemplifies the case of destabilizing or morally distasteful activity (for example, the *Nicaragua* case or a case of systematic governmental detention of individuals without trial); C_2 exemplifies the routine maritime boundary dispute, where the parties are not threatening to use force against each other. In each case, any combination of actual practice and articulated *opinio juris* falling to the northeast of the relevant restrictive custom curve (for example, at point D) establishes the restrictive customary duty. Any combination of actual practice and articulated *opinio juris* falling to the southwest of the relevant restrictive custom curve (for example, at point E) does not rise to the level of custom. A combination falling at point F would establish a restrictive custom in a case like *Nicaragua*, but not in a more routine instance. It is assumed in each case that the asserted customary rule is reasonable under the circumstances.

The diagram, of course, does not provide a quick and easy solution to difficult cases. It simply illustrates what international decision makers such as the International Court tend to do when a restrictive customary rule is at issue. Most importantly, it provides a means for visualizing the de facto sliding scale that combines actual state behavior with observable *opinio juris*.

It also helps explain how the Court in the *Nicaragua* case found customary rules restricting the threat or use of force in the circumstances presented to it.

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THE *NICARAGUA* CASE AND THE DETERIORATION OF WORLD ORDER

For all their greatness, democracies historically have difficulty in perceiving and deterring totalitarian aggression. William Stevenson reminds us in *A Man Called Intrepid* that debate raged within the United States as to whether we should enter World War II on the side of England even after the rest of Europe had fallen to the Nazis. The American ambassador to England cautioned against such entry, arguing that England was militarily doomed. President Roosevelt, who had months earlier secretly committed U.S. intelligence assets to British support, felt that he did not have the necessary popular support to enter the war. And the British were so concerned about American indecisiveness that even after Pearl Harbor they executed a covert operation to persuade Hitler to declare war on the United States, which, of course, he did before America entered the war against Germany.¹

This historic difficulty of the democracies, which is rooted in a healthy abhorrence of war and a mirror imaging of the good faith motives of others, is placed under particular stress when aggressive attack is concealed. Traditionally, aggression has meant armies openly on the march across international boundaries. Hitler could delay the democracies' understanding of the attack on Poland by staging a fake Polish attack on Germany. But within a week the resulting misinformed *New York Times* story on the Polish raid and expected general Polish attack was swept aside as the reality of Panzer armies and Stuka attacks against Poland brought home the Nazi aggression.² As Afghanistan should remind us, such open aggressive attacks can still take place; and when they do, they are generally perceived as aggression. But more often in the contemporary international system, aggressors rely on sophisticated and secret support for terrorist attacks, coups or protracted guerrilla "liberating struggles." By denying these attacks, the aggressors seek to compound the problem of the world community in responding to them and to receive the protection of the very system of world order they are attacking. Sadly, there is every indication that the strategy of secret war is working to inhibit the democratic response and deterrence of aggressive attack. More ominous for the future of world order, this strategy of secret warfare is destroying the very fabric of the international immune system against aggressive attack as the secret attack blends in with a background

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¹ See W. STEVENSON, *A MAN CALLED INTREPID* 82-84, 114, 123, 299-300 (1976).

² *Id.* at 45.

noise of worldwide terrorism and the visible democratic response is treated as the very aggressive attack to which it is responding. It is as though secret warfare could work a metastasis of aggression, spreading it throughout the international system and transforming the defensive response to aggression in the perception of the systemic response mechanisms.

The decision of the International Court of Justice in the *Nicaragua* case³ starkly reveals the severe deterioration in the global deterrent system and the corrosive effect of the strategy of covert aggression. The decision itself is a tragedy for world order and for hopes to strengthen international adjudication. More important, however, it and the equally inverted Security Council debate triggered by the decision⁴ are symptomatic of serious erosion of the Charter system for deterring aggressive attack. The great system of world order established in the United Nations Charter after two thousand years of human struggle against the scourge of war lies dangerously close to death. It can only be raised by the oxygen of truly united nations determined to condemn aggressive attack, whether open or secret, and to support the right of effective individual and collective defense against such attack.

The motivation of the majority of the Court in the *Nicaragua* case was almost certainly good. The dedicated judges believed they saw an opportunity to curtail some of the increasing violence sweeping the world and to uphold the rule of law. Possibly, they also wished to strengthen the role of the Court in dealing with world order disputes. And some may have internalized early hopeful assumptions about the Sandinista revolution against Somoza. Unfortunately, the rush to achieve these good ends, coupled with the propensity of judges of good will to take all sides at their word, caused the Court to set aside its usual caution and to produce a decision whose effect will be strongly negative for world order, social justice in Central America, the rule of law, human rights and the Court as an institution. Indeed, the decision is as tragic and inverted for world order as was *Plessy v. Ferguson*⁵ for equal protection, but the contemporary crisis in world order cannot afford to wait 58 years for a *Brown v. Board of Education*.⁶

The full scope of the judicial tragedy is clear. The highest Court of the international system and principal judicial organ of the United Nations has disregarded overwhelming evidence of aggression by Nicaragua against its neighbors and has condemned the lesser defensive response to that aggression as the aggressive attack. Simultaneously, it has announced, contrary to the Charter, a restrictive interpretation of the right of defense that could deny individual or collective defense against secret warfare, the most serious contemporary threat to world order. It has even implied—inadvertently revealing a political agenda and a lack of understanding of the fundamental

³ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

⁴ See UN Docs. S/PV.2694-98 (July 1-3, 1986). In this debate only the United States and El Salvador spoke of the continuing Nicaraguan aggression against neighboring states.

⁵ 163 U.S. 537 (1896). *Plessy* is the infamous U.S. Supreme Court decision that upheld the doctrine of separate, but equal, under the equal protection clause of the U.S. Constitution.

⁶ 347 U.S. 483 (1954). *Brown* overturned *Plessy*.

Charter prohibition of aggression—that aggressive attack might be permissible if pursuant to a “process of decolonization.” To compound the disaster, the decision did not even condemn the ongoing secret attack by Nicaragua against its neighbors but rather solely condemned the defensive response—though the response was virtually identical in kind and lesser in scope and effect than the attack. Finally, in its rush to judgment, the majority has stretched its own jurisdiction beyond the breaking point and has ignored its own principles of admissibility and fair procedure, including particularly the need to find the facts fully and objectively, which is so fundamental to the integrity of the Court.

There is not space in a brief Comment to restate the by now undeniable evidence of the Cuban-Nicaraguan secret war against Central American states or the core factual misperceptions of the majority opinion. My article in the *Journal*⁷ already has set out the evidence at some length and a fuller exposition will be forthcoming in book form.⁸ Similarly, a forthcoming book by Robert F. Turner, a former Deputy Assistant Secretary of State for Congressional Relations and Counsel to the President’s Intelligence Oversight Board, collects and summarizes the facts of the continuing Nicaraguan aggression against El Salvador, Honduras and Costa Rica.⁹ Moreover, all that is needed of the basic factual setting of the case is contained in the brilliant dissenting opinion of Judge Stephen Schwebel. The majority’s treatment of the facts quite simply cannot be reconciled with the facts as set out by Judge Schwebel.

As illustrative of the Court’s difficulty in handling the facts of the case, it might be useful to focus on a significant factual assumption used by the Court to condemn the United States, that notice had not been given of the small-scale mining of Nicaraguan harbors. Even a modicum of research shows that this assumption was materially false. As reported by the Court, the first explosion of the small-scale mines was on February 25, 1984. Yet the Nicaraguan Democratic Force (FDN) initially announced the mining on October 7, 1983, more than 4 months prior to the first explosion. The announcement was made via FDN radio at its 10:30 A.M. and 11:00 P.M. broadcasts on October 6, and a telex was sent to Lloyd’s of London on the morning of October 7. Stories about this notice of mining were carried on the major wire services, including the Associated Press in two stories on October 7 and United Press International in three stories on October 7 and 8.¹⁰ These wire service stories resulted in worldwide reporting of the mining, including, for example, front-page headlines in Mexico on October 8 and a

⁷ See Moore, *The Secret War in Central America and the Future of World Order*, 80 AJIL 43 (1986).

⁸ J. MOORE, *THE SECRET WAR IN CENTRAL AMERICA* (1987).

⁹ R. TURNER, *NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS* (1987).

¹⁰ See, e.g., Associated Press, Oct. 7, 1983, A.M. cycle (two stories); United Press International, Oct. 7, 1983, A.M. cycle (two stories); and Oct. 8, 1983, A.M. cycle. These contra threats to shipping were sufficiently clear that Nicaragua sent a protest note to the United States saying that it would hold it responsible for any attacks against shipping. See United Press International, Oct. 7, 1983, A.M. cycle.

report in the *New York Times* dated October 7.¹¹ In response to a request, the manager of the Lloyd's Intelligence Department provided the author with a summary of reports in October 1983, including specific FDN warnings of mining reported on October 7 and 11, and continuing general warnings against shipping involved in delivering oil and weapons to Nicaragua.¹²

The Court itself had uncontested evidence before it that the contras had given notice of mining on January 8, 1984—which actually was a second round of notice and was still given more than a month prior to the first mining incident.¹³ The Court also had before it a statement by Edgar Chamorro, a former FDN leader, that “he was instructed by a CIA official to issue a press release over the clandestine radio on 5 January 1984” giving notice of the mining. The Court had before it no evidence contradicting the evidence that notice of the mining had been given and apparently the Court made no effort to explore the full facts. Instead, it simply made a finding that the United States had not issued any public warning. It can, of course, be argued that the United States itself, as opposed to those apparently working with it, had to issue the notice, but Hague Convention No. VIII governing mine warfare states no such requirement during hostilities for mines that remain under surveillance off the coasts and ports of a belligerent.¹⁴ More importantly, it is hard to see how the Court could simultaneously hold the United States responsible for contra actions and ignore contra notice of the mining. In any event, the Court does not discuss this legal issue but simply feeds the established myth that no notice of the mining was given.

Quite apart from the factual inversion of the aggressive attack and defensive response in Central America, the Court's announced rule “that the concept of ‘armed attack’ [does not include] . . . assistance to rebels in the form of the provision of weapons or logistical or other support” is flatly wrong as a principle of international law. Again, Judge Schwebel's dissent devastates the majority on this point. Moreover, the law in this regard was discussed in full in my recent article in the *Journal*. There is thus no point in repeating it here. Nevertheless, it is particularly surprising to have the Court announce as law a position soundly rejected in the multi-year General Assembly effort to define aggression.¹⁵ Moreover, the purported applicability of the rule to the *Nicaragua* case is premised on a distorted factual basis

¹¹ *Nicaraguan Guerrillas Report Laying Mines at a Key Port*, N.Y. Times, Oct. 8, 1983, at 3, col. 6.

¹² Communication from K. J. Bickmore, Manager, Intelligence Department, Lloyd's of London, to the author (Oct. 2, 1986, on file at the University of Virginia School of Law).

¹³ In a hearing before the House Committee on Foreign Affairs, Deputy Secretary of State Kenneth Dam testified that “all nations are, in fact, warned and were warned through Lloyd's of London by the Contras . . .” *The Mining of Nicaraguan Ports and Harbors: Hearings on H. Cong. Res. 290 Before the House Comm. on Foreign Affairs*, 98th Cong., 2d Sess. 31 (1984).

¹⁴ See Hague Convention Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, TS No. 541, reprinted in 2 AJIL Supp. 138 (1908).

¹⁵ The author has confirmed the General Assembly rejection with at least one legal expert involved in the negotiations to define aggression. Judge Schwebel has an excellent discussion of the point in his dissenting opinion. See Dissenting Opinion of Judge Schwebel, 1986 ICJ REP. at 259, 341–47, paras. 162–71.

focusing on arms flow and ignoring the full range of Nicaraguan involvement with the insurgents of the Farabundo Martí National Liberation Front (FMLN). Most importantly, this purported rule would have disastrous consequences for world order. It would simultaneously encourage secret aggressive attack through support for terrorists and guerrillas and discourage effective defense in response. It would also deprive smaller states such as El Salvador of their right of collective defense against the core world order threat today. It is inconceivable that this purported rule would be accepted by the United States or any other major democratic nation and Judges Jennings and Schwebel are clearly correct in rejecting it out of hand.

The formalism of the Court in implying that El Salvador had made no request for assistance and had not "declared itself to have been attacked" is also incredible. Nothing in the opinion more clearly indicates how the Court is genuinely confused by a strategy of secret war. The setting of such an attack in the real world is a complex politico-military setting in which the attacked state hopes that the attack will go away and seeks diplomatically to keep the issue low-key. President Duarte, of course, has repeatedly mentioned the Nicaraguan attack against El Salvador in press conferences.¹⁶ But formalistic public announcements of attack and requests in such a setting are only slightly less unlikely than acknowledgment of its attack by the aggressor state. Moreover, how the majority of the Court could maintain this position in the face of the Salvadoran petition to the Court manifestly declaring the attack and assistance, and the Court's own denial of Salvador's request to appear, is, if possible, even harder to understand. One wonders why it was beyond the Court's ability, if it did harbor doubts as to whether El Salvador considered itself attacked by Nicaragua, simply to ask El Salvador rather than preventing it from appearing before the Court.

Perhaps the most remarkable legal failure of the majority is its failure to condemn, even in passing, an uncontroversially illegal ongoing attack from Nicaragua against neighboring states. In this connection, the Court specifically found "that support for the armed opposition in El Salvador from Nicaraguan territory was a fact up until the early months of 1981." Even if unable to support a U.S. defensive response, the Court could have been expected at a minimum to have condemned *all* assistance to insurgent groups, including Nicaragua's continuing assistance to the FMLN. The Court's failure to do so is a failure that will live in infamy.

The majority of the Court was also wrong in assuming jurisdiction in this case. Once the majority admitted that the U.S. multilateral treaty reservation was applicable, as it did, the ineluctable conclusion was that the Court had no jurisdiction. The majority's subsequent effort to exercise jurisdiction in the face of such a manifest absence of jurisdiction is a classic example of *excès de pouvoir*, depriving the opinion of any legal effect.¹⁷

Nothing could be clearer than the fact that the *Nicaragua* case arises under the UN Charter, the OAS Charter, the Rio Treaty and Hague Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines,

¹⁶ See Moore, *supra* note 7, at 63.

¹⁷ See *id.* at 113-15.

among other multilateral treaties. It is this network of multilateral treaty obligations that provides the governing law in the case. It would not pass the straight-face test to assert that customary law, if in conflict with these multilateral treaties, including the United Nations Charter, would prevail over them. To decide the *Nicaragua* case solely on the basis of customary international law and a bilateral treaty of friendship, commerce and navigation, then, is either to ignore the governing law in the case or to make a legal decision that customary international law *both* is consistent with *and* contains all the relevant rights, privileges, powers and immunities of these multilateral treaties. The former would be a shocking violation of Article 38 of the Statute of the Court, which requires the Court to apply international conventions establishing rules expressly recognized by the contesting states. In this connection, the pleadings of both Nicaragua and the United States recognized the UN and OAS Charters as governing. The latter would amount to interpreting these multilateral conventions as much as customary international law because a determination that they are identical in relevant part requires an interpretation of *both* conventions and customary law. But interpreting these treaties was ruled out by the multilateral treaty reservation, else the Court would have applied the treaties rather than customary international law in the first place.

There is simply no way out of this obvious inconsistency either with the obligation under Article 38 to apply the governing law or with the prohibition under the multilateral treaty reservation of interpreting multilateral treaties in the case. Just to give two examples: if the majority's purported (but erroneous) legal rules that armed attack cannot be produced by indirect aggression and that collective defense requires a formal public request are not interpretations of the Charter, then the Court may not have applied *Charter* governing law in the case on crucial points of law. Not to apply governing law violates Article 38 of the Statute. But if either is an interpretation of the Charter by the Court, then the multilateral treaty reservation is violated.

Apart from this logical inconsistency (and classic logical fallacy) in the Court's assumption of jurisdiction, it is also not clear that these multilateral treaties can be ignored even if customary international law is wholly consistent with them. That is, even if customary international law is consistent with the governing multilateral treaty law of the case, that treaty law may create relevant rights, privileges, powers and immunities *not* part of customary law and going beyond it. In the *Nicaragua* case, it clearly does. For example, the treaty obligation under Article 3 of the Rio Treaty to come to the assistance of an attacked state may well prevail over any inconsistent obligation in the FCN Treaty with Nicaragua.¹⁸ Certainly, customary law contains no such obligation to provide assistance in collective defense. And to fail to consider the relation between the Rio Treaty obligation to provide collective defense

¹⁸See OAS Charter, done at Bogotá Apr. 30, 1948, 2 UST 2394, TIAS No. 2361, 119 UNTS 3, as amended Feb. 27, 1967, 21 UST 607, TIAS No. 6847; Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Sept. 2, 1947, 62 Stat. 1681, TIAS No. 1838, 21 UNTS 77.

and the national security clause in the FCN Treaty could—and did—severely prejudice the U.S. case. Similarly, Article 3 of the Rio Treaty and Article 21 of the OAS Charter make it clear that an attack against El Salvador is an attack against the United States.¹⁹ Again, customary international law contains no such provision. How might such a treaty provision lessen the need for any asserted formalities (as opposed to realities) of invitation? We will simply never know because this governing treaty law was not considered by the Court.

The treatment by the Court of Hague Convention No. VIII is illustrative of the Court's straining to reconcile the need to apply governing treaty law with the multilateral treaty reservation prohibiting its doing so. Hague VIII, concluded in 1907, is a multilateral treaty in force between the United States, Nicaragua and El Salvador, among other states. It establishes the governing law on mine warfare between international belligerents. The Court makes one possible interpretation of the Convention, that it requires notice for mining in this case. In doing so, however, the Court fails to reveal that the Convention specifically requires notice in three circumstances only; that it omits any such notice requirement for mines off the coasts and ports of a belligerent while those mines remain under surveillance; and that even if such mines are not under surveillance, notice is required only "as soon as military exigencies permit." The meaning of this latter phrase triggered a dispute among the belligerents in World War II. But rather than interpreting this language and dealing with a major legal uncertainty in Hague VIII, the Court selectively omits the important qualifying phrase from its quoting of relevant Hague VIII provisions. The point is not to second-guess the Court on the appropriate interpretation of Hague VIII, but rather to indicate that if Hague VIII does not require notice in the circumstance before the Court, it would have been governing treaty law between the parties inconsistent with customary international law as declared by the Court. In a case where forbidden to apply multilateral treaty law, the Court certainly seems to have interpreted Hague VIII, and in doing so the Court took substantial liberties with the language of the Convention and never came to grips with the real issue of interpretation on notice under the Convention.

Most importantly on the jurisdictional issues, the purpose of the multilateral treaty reservation is to protect absent, but affected, third states. That purpose is as prejudiced by proceeding with the case on the flimsy fiction that it is being decided under customary international law as by openly proceeding under the applicable multilateral treaties. El Salvador's right to effective defense has been severely harmed by the *Nicaragua* case. Indeed, obviously elated by the *Nicaragua* decision, the Sandinistas in the ultimate perversion of judicial process have now brought actions against Honduras and Costa Rica, nations they continue to attack through terrorism and subversion, to compel their termination of any participation in defensive response.

¹⁹ See OAS Charter and Rio Treaty, *supra* note 18.

The majority opinion, in straining to strengthen the Court's role, has also severely damaged the integrity of the judicial process. First, the denial of El Salvador's application to intervene without even according El Salvador a hearing, together with the release of a press statement about the denial apparently even prior to the decision of the Court, will remain a blot on the Court's record.²⁰ The extraordinary criticism of this decision at the merits phase by Judges Oda and Lachs (who voted with the majority to deny the hearing) means that the nine to six vote for this denial at the jurisdictional phase may by the merits phase have shifted to seven to eight against it. Given this apparent shift, should not El Salvador have been offered a belated hearing prior to consideration of the merits, particularly since the Court also dealt with jurisdictional issues at the merits phase? Such a hearing could have brought important facts more clearly to the attention of the Court, particularly the view of El Salvador that it was being attacked by Nicaragua and assisted by the United States, about which the Court seemed to have doubts. Second, the press interview discussed by Judge Schwebel, in which the President of the Court publicly attacked the United States during an ongoing case involving the United States, will remain an extraordinary failure of judicial propriety.²¹ Third, the admitted inability of the Court to ascertain the facts of Nicaraguan aggression against neighboring states surely should have caused invocation of its admissibility doctrine as a grounds of abstention rather than continuation of the case with the indication that it did not have enough evidence to impute responsibility to Nicaragua for the acts specifically found by the Court to have emanated from Nicaragua's territory. That is, does not the Court have an obligation in such a setting to determine either that Nicaragua is or is not assisting the FMLN and not to decide the case while declaring it lacks enough information to resolve this critical point? The facts of Nicaraguan involvement, after all, were the essence of the case for a right of collective defense in response. As a related neglect of fact assessment, the failure of the Court to use its fact-finding powers—much cited by Nicaragua as to why the Court's doctrine of admissibility should not apply—is a shocking breach of its obligation under Article 53(2) of the Statute of the Court to satisfy itself "that the claim is well founded in fact and law." In this respect nothing sophisticated was needed. The Court could simply have asked El Salvador whether it was undergoing an armed attack from Nicaragua and whether it had sought United States assistance. Why was the Court unable merely to look at the public record on these issues?²² Why was it seemingly unaware of the notice given of the small-scale mining? Why did it not have before it the results of the congressional investigation

²⁰ See 1986 ICJ REP. at 313, para. 109 (Schwebel, J., dissenting).

²¹ See *id.* at 314-15, para. 115.

²² The public record is replete with official statements by Salvadorans that they are being subjected to Nicaraguan aggression and that the United States is assisting in response against this attack. See, e.g., statements in Moore, *supra* note 7, at 62-63 and 63 n.77. In the manuscript of his book on the Central American war, Turner gives more than three pages of such Salvadoran official statements under numerous administrations. See R. TURNER, *supra* note 9. These Salvadoran statements date from as early as May and June of 1980.

on the contra manual or seek independently to develop the facts.²³ Fourth, the very title of the case, as pointed out by Judge Schwebel, and the failure to have an evenhanded provisional order prior to any fact determination reflect a disturbing lack of impartiality in consideration of the case. Fifth, the process used by the Court to identify customary international law was remarkably cavalier. One would have thought that such an important series of findings about customary law would have been accompanied by more precise, full and accurate analysis. Sixth, as argued by the United States in its discussion of admissibility, the assumption by the Court of jurisdiction in a setting of ongoing hostilities could hinder diplomatic efforts at settlement. This has now occurred and the Contadora process has been halted by Nicaragua's filing of its satellite cases against Honduras and Costa Rica.²⁴ Finally, the apparent practice of the Court of using affidavits solely for admissions against interest, and its failure to appraise critically the serious inconsistencies between Nicaragua's affidavits and the public record, can only cause loss of respect for the Court. More important, this practice does not seem calculated to encourage truthfulness in proceedings before it. The Court, by failing to penetrate the affidavit veil, is in yet another way encouraging secret aggression.

Judge Schwebel particularly, but also Judges Oda and Jennings, deserve congratulations for refusing to join the rush to an inverted judgment. The Court certainly has produced the most spectacular example to date of failure of the international immune system against aggressive attack. Sadly, this failure of the Court is only a symptom of a more serious and pervasive problem afflicting all the principal international institutions for the avoidance of war. In the haunting words of Churchill after Munich, the Court and more broadly the global deterrent system "have been tried in the balance and found wanting." If there is any ray of hope from the *Nicaragua* decision, it may well be that it is so spectacularly wrong that it will contribute to greater understanding of the failure of the global deterrent system in the face of the secret-war challenge.²⁵

JOHN NORTON MOORE*

²³ With respect to the contra manual, one wonders whether the Court was aware that one of Nicaragua's principal witnesses before the Court, Edgar Chamorro, had supervisory responsibility for the Spanish translation of the manual, that it was this translation from the English that was principally responsible for the introduction of the controversial language and that the manual was largely corrected by other FDN members before it was distributed. It was this early and discarded translation prepared under Chamorro that was leaked to the press and rightly criticized by the Court.

²⁴ See *2 Nations Suspend Peace Talks Role*, Wash. Post, Nov. 8, 1986, at A19, cols. 4-6.

²⁵ For an interesting discussion of some elements of the broader problem, see J.-F. REVEL, *HOW DEMOCRACIES PERISH* (1984). Revel's collection of Western newspaper accounts ignoring the Cambodian genocide is a graphic example of the denial syndrome also at work in the *Nicaragua* case. See also Rosenne, *Terrorism: Who Is Responsible? What Can Be Done?*, 148 *WORLD AFF.* 169 (1985-86).

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LEGAL ISSUES IN THE *Nicaragua* OPINION

The opinion of the International Court of Justice in the *Nicaragua*¹ case will be of interest primarily because of its general pronouncements on questions of international law. Its impact on the immediate controversy appears slight; the United States Government has strongly indicated its view that the Court lacked jurisdiction over the controversy,² has vetoed subsequent proposed Security Council resolutions on the subject,³ and is appropriating additional funds for the contested activities, without apparent reference to the Court's decision. This Comment is limited to the general theoretical and legal issues and will not treat the underlying factual issues, the Court's disposition of the immediate case or the implications of the opinion for the evolution of the dispute.

The opinion will be a source of scholarly discussion on a number of general issues, only some of which can be mentioned here. Whether the Court's interpretations will withstand the test of time to become an accepted part of customary international law, or are later viewed as steps or even aberrations in that development can only be decided on the basis of their acceptance and application in state practice.⁴

Two of these issues are substantive: the ruling of the Court on sources of new international law and its interpretation of the limits on the use of self-defense to aggression. Two are procedural: its treatment of nonappearing states and the consequences of its bifurcation of jurisdiction and merits phases. Each of these topics merits more substantial treatment than is possible in the short space available here. The basic issues can only be outlined.

SOURCES OF LAW

The most significant new pronouncement is the Court's treatment of the genesis of new customary international law. It will have ramifications far beyond the immediate controversy.

This and other innovations were occasioned by a peculiarity of the now revoked 1946 United States Declaration accepting the jurisdiction of the Court. That document excluded "disputes arising under a multilateral treaty, unless . . . all parties to the treaty affected by the decision are also parties to the case before the Court."⁵ Thus, Nicaragua's claims based directly upon alleged violations of the United Nations Charter and inter-American treaties were excluded from consideration, even on the assumption that jurisdiction

¹ Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

² Department Statement, Jan. 18, 1985, DEP'T ST. BULL., No. 2096, March 1985, at 64. See also departmental statements following the June 27 decision.

³ See, e.g., UN Doc. S/PV.2704, at 54-55 and 57-61 (1986) (rejecting a resolution proposed in UN Doc. S/18250 (1986)).

⁴ The decision is, of course, not a binding precedent. See Statute of the International Court of Justice, Art. 59, 59 Stat. 1055 (1945), TS No. 993.

⁵ This was part of reservation (c) to the 1946 Declaration accepting the jurisdiction of the Court, 61 Stat. 1218 (1947). It is commonly known as the Vandenberg reservation.

was established.⁶ Nicaragua had anticipated this problem and had originally pleaded its case in the alternative under the Charter and treaties and under customary international law.⁷ Its problem was in establishing a customary law separate from the Charter and treaty obligations.

The Court found—in rather substantial detail—that much of the alleged customary law was established principally through its elaboration of two resolutions of the United Nations General Assembly, Resolution 2625 (XXV) on the Principles of Friendly Relations and Resolution 3314 (XXIX) on the Definition of Aggression. The status of General Assembly resolutions has been a subject of academic and political controversy for many years, although few have argued for a direct law-creating effect for them. This decision goes much farther than its predecessors in transforming them from exhortations or “soft law” principles into “hard law” prescriptions, at least in the eyes of the Court.

The Court does not explain the genesis of this obligation with any clarity. The source of new obligation is not that usually argued in the literature, uniform state practice as evidenced by declaration and subsequent conduct. Indeed, the Court candidly acknowledges the inconsistency of that state practice.⁸ Nor is it to be found in the crystallization or interpretation of Charter obligations. The kernel of the Court’s reasoning is to be found in the middle of paragraph 188 of the opinion:

The effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.⁹

This appears to base the international legal obligation more on a kind of broadly expanded Ihlen declaration,¹⁰ a view that has some peculiar and potentially drastic consequences. Every resolution that purports to express a legal norm, even a “soft law” exhortation or aspiration, has the potential of being recognized by the Court as a binding and strictly enforceable obligation, at least for those states which did not expressly dissent from it.

This is clearly much broader than the traditional obligation in accordance with the Ihlen declaration. It permits an obligation to be created by silence (by not objecting to a consensus resolution), without a showing of reliance by the other party.

⁶ In its decision of Nov. 26, 1984, the Court had found that this objection to jurisdiction was not exclusively of a preliminary character and postponed its decision to the merits stage. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392, 425, para. 76 (Judgment of Nov. 26). In the opinion on the merits, the discussion is at 1986 ICJ REP. at 31–38 and 146, paras. 42–56 and 292(1). This objection applied only to jurisdiction claimed under the 1946 Declaration.

⁷ Application of Nicaragua, Apr. 9, 1984, paras. 15–19 (claim under Charter and treaties) and 20–25 (claim under customary law).

⁸ 1986 ICJ REP. at 98, para. 186.

⁹ *Id.* at 100, para. 188.

¹⁰ Legal Status of Eastern Greenland, 1933 PCIJ, ser. A/B, No. 53 (Judgment of Apr. 5).

The new international law thus created would apparently be binding only between the states that acquiesced in the declarations in question, and as such would give rise to a new body of multilateral, but not universal, law. The consequence is a solution less drastic than one that would recognize a universal validity for such resolutions. It will nevertheless enhance the legal status of those resolutions and consequently the importance of express negative votes in international organizations (not necessarily only the General Assembly), if the state is not fully satisfied that every provision of the proposed resolution, separately and literally applied, is acceptable to it.¹¹ In effect, the decision changes General Assembly resolutions from a step in the evolution of international law to the end result of that process.

The concern about this expansion of justiciable rules of law is compounded by the Court's method of interpretation of the two resolutions in question. It dealt with single articles or paragraphs, with little reference to the resolutions as a whole.¹² It appears to be a technique of interpretation even more based on text than is called for by the Vienna Convention on the Law of Treaties.¹³ If this technique is followed, the practice of seeking diplomatic compromises through "balancing" the language of different articles in resolutions appears futile—if not doomed.

Finally, this approach creates a substantial shift in responsibility for decisions. International treaties, creating new international law, have traditionally been negotiated at international conferences, signed, subjected to careful review both in the executive branch and in the legislature, and finally submitted for ratification. An equal obligation can apparently be created, under the Court's new theory, when a representative to an international organization permits a resolution to pass by consensus, failing to record an express negative vote. This is an act of a much lower official, preceded by much less consideration of the obligations incurred, confined almost exclusively to the executive branch and made without opportunity for public review or comment. Whether states are willing to accept this expanded view of the binding effect of resolutions remains to be seen.

THE DEFINITION OF AGGRESSION

The Court gave particular credence to the General Assembly's Definition of Aggression.¹⁴ That resolution was the result of committee consideration and deliberation that lasted nearly 30 years. The deliberations were extended

¹¹ For this view, see Wolfrum, *Gewohnheitsrecht und Stimmverhalten*, 1986 VEREINTE NATIONEN 93.

¹² For example, in paragraph 195, 1986 ICJ REP. at 103, the Court refers to Article 3(g) of the Definition of Aggression as a statement of customary international law on the subject, without referring to Article 8 ("In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions") or to Articles 4 and 6, which appear to preserve a right of individual and collective self-defense.

¹³ Article 31(1) of the Vienna Convention calls for interpretation of the terms of a treaty "in their context and in light of its object and purpose." The context clearly includes the entire text of the treaty, not isolated paragraphs.

¹⁴ GA Res. 3314 (XXIX) (Dec. 14, 1974).

because there were essentially two competing concepts. One was formalistic and concentrated on the first use of certain forms of armed force. The other was a more contextual view, asserting that certain forms of coercion could be the equivalent of aggression.¹⁵ A compromise solution was reached that enumerated some aggressive acts, but left the identification of others to the Security Council in individual situations and preserved the provisions of the Charter concerning the lawful use of force.¹⁶ The opinion rests solely on the enumeration of aggressive acts and fails to discuss the implications of the other provisions. This fragmentation of the resolution totally distorts the character of the consent given to it. It changes the impact of the resolution from a balance between the two competing definitions to an imbalance in which the "enumerative list of aggressive acts" approach, long opposed by the United States, carries the day.

The opinion also states that only the substantive, and not the procedural, limitations on the use of force have become customary international law.¹⁷ It nevertheless recognizes a rule (apparently substantive and not procedural) that collective self-defense can be exercised only on the basis of a contemporaneous assertion by the victim state that it has been attacked and a request for outside assistance.¹⁸ This requirement flies in the face of the networks of collective self-defense treaties, and may well be unrealistic in an electronic age.

While these substantive issues will be of general importance, two additional procedural issues will be of interest mostly to those who follow the work of the Court itself.

NONAPPEARING DEFENDANTS

Since the United States did not appear in the merits phase of the proceeding, the Court examined the merits on the basis of the evidence available to it.¹⁹ In doing so, it explicitly took into account a document prepared by the United States Government and made available to the Court, but not formally presented to it.²⁰ The Court has long been willing to consider the statements of nonappearing parties in at least some circumstances. "Telegraphic nonappearances," in which the state indicates its refusal to appear

¹⁵ For a discussion of some of the earlier history of this effort, see A. J. THOMAS, JR. & A. THOMAS, *THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW* 21-44 (1972).

¹⁶ For a statement of the U.S. understanding of the connection of the articles, see Rosenstock, 70 DEP'T ST. BULL. 498 (1974). The definition enumerates specific acts in its Article 3, but does so "subject to and in accordance with the provisions of article 2." That article gives the Security Council the power to conclude otherwise, "in light of other relevant circumstances." Article 8, the definition's rule of interpretation, says that it must be read as a whole. The Court referred only to Article 3.

¹⁷ 1986 ICJ REP. at 105, para. 200.

¹⁸ *Id.*, para. 199.

¹⁹ ICJ Statute, *supra* note 4, Art. 53.

²⁰ 1986 ICJ REP. at 25 and 44, paras. 31 and 73. The document, *Revolution Beyond our Borders*, was originally published as a U.S. government document. It was later submitted to the United Nations and circulated as UN Docs. A/40/858 and S/17612 (1985). Copies were made available to the Court.

and briefly articulates its objections to jurisdiction in a telegram to the Court, are frequent.²¹ In at least two other cases in recent years, the views of absent parties have been brought to the Court by extraordinary means. The French submitted a "White Book" to the Court's library in *Nuclear Tests*,²² and Iceland managed to get most of its case before the Court in *Fisheries Jurisdiction*²³ by means of press statements that were duly included in the written proceedings of its British opponents. Given the paucity of defendants that have appeared voluntarily in recent years,²⁴ the Court must either recognize such communications or deal with an entirely one-sided presentation. Since, in reality, the effectiveness of its judgments is based to a large measure on their persuasiveness, the former is clearly the wiser course. Following civil law approaches, the Court has never been as fastidious about the rules of evidence as is customary in common law jurisdictions. Its candid recognition of such extraordinary communications and regulation of the extent to which they are considered merely clarifies an existing practice.

One passage, however, should cause concern to those who would like to see international controversies brought before the Court. It suggests that the United States, by joining the proceedings to contest the Court's jurisdiction, somehow submitted to it.²⁵ If followed, that view would encourage states that seriously contest the Court's jurisdiction to stay away from the tribunal altogether, rather than to submit their jurisdictional arguments to it. If resort to the Court means forgoing extraordinary postjudicial remedies for *excès de pouvoir*, then states may well choose to ignore it totally, especially in light of the Court's obligation to satisfy itself on jurisdictional questions.²⁶

The jurisdiction of the Court is established by the Statute and the relevant jurisdictional documents (declarations under 36(2), compromissory clauses or treaties).²⁷ It exists *vel non* without regard to the conduct of the respondent state subsequent to the filing of the application. To extend the doctrine of *forum prorogatum* to objecting parties will only encourage them to stay even farther from the forum—surely an undesirable result.

RELATIONSHIP OF PHASES

As it has done in several recent cases, the Court *sua sponte* separated the issues of jurisdiction and admissibility from the merits, an action that raises two interesting issues. The Court began to use this procedure regularly about a decade ago, primarily to permit it to examine jurisdiction when the

²¹ Examples can be found in *United States Diplomatic and Consular Staff in Tehran*, 1980 ICJ REP. 3 (Judgment of May 24), and in the *Nuclear Tests Cases* (Austl. v. Fr.; NZ v. Fr.), 1974 ICJ REP. 253, 457 (Judgments of Dec. 20).

²² 1974 ICJ REP. 253, 457.

²³ *Fisheries Jurisdiction* (UK v. Ice.; FRG v. Ice.), Merits, 1974 ICJ REP. 3, 175 (Judgments of July 24).

²⁴ If cases brought before the Court by contemporaneous *compromis* are excluded, it has been more than a decade since a state appeared before the Court as a defendant—other than the United States in the jurisdictional phase of this case.

²⁵ 1986 ICJ REP. at 23, para. 27.

²⁶ ICJ Statute, *supra* note 4, Art. 53(2).

²⁷ This includes Article 36(6).

respondent state did not appear.²⁸ Thus, in the absence of jurisdiction, it would not be burdened with the argument on the merits; in the presence of jurisdiction, the respondent might decide to appear in later phases.

The Court's Rules provide explicit procedures for preliminary objections raised by the respondent party,²⁹ but deal only summarily with procedures for a jurisdictional phase raised by the Court itself.³⁰ Although the procedures for dealing with preliminary objections are frequently applied by analogy in the case of a jurisdictional phase, there are clear differences. The burden of raising the objection, the order of argument, the burden of persuasion and the preclusive effect are (or may be) different. In a close case, the decision to separate the phases might have an outcome-determinative effect. It may well be time to study this issue and to establish formal standards for this new (and welcome) procedure.

One particular point might be addressed in that analysis. What is the proper course of action, in the second phase of a case, for a judge who believed (in the first phase) that there was no jurisdiction? In the present case, two judges who had voted against jurisdiction also voted against the claim on the merits, apparently basing their subsequent votes largely on the lack of jurisdiction.³¹ Two other judges who opposed jurisdiction in part nevertheless participated in those parts of the decision over which they had found no jurisdiction.³² Although balanced in this case, the effect of such procedural differences could well determine the outcome in future cases. The proper role in later phases for a judge who initially asserts lack of jurisdiction deserves explicit study and possibly explicit regulation.

It is also possibly worth noting that at least one judge may now be concerned about the summary manner in which El Salvador's attempted intervention was treated.³³ The modern Court has only once allowed an intervention in its entire history.³⁴ It is clearly on the horns of a dilemma. If it

²⁸ Jurisdictional phases were previously ordered in *Fisheries Jurisdiction, Aegean Sea Continental Shelf* and *Nuclear Tests*, after the respondent states had objected to jurisdiction in preliminary communications to the Court but did not appear formally in the proceedings.

²⁹ Rules of Court, ICJ ACTS AND DOCUMENTS, No. 4, Art. 79, paras. 1-5 (1978).

³⁰ *Id.*, para. 6.

³¹ See Dissenting Opinions of Judges Oda, 1986 ICJ REP. 212, 214-46, paras. 1-72, and Sir Robert Jennings, 1986 ICJ REP. at 528, 528-29.

³² Judge Ruda, who had opposed jurisdiction under the FCN Treaty, nevertheless participated in the determination of questions arising under that Treaty, explaining his reasons in 1986 ICJ REP. at 176-77, paras. 16-17 of his opinion. Judge Ago, who had dissented from jurisdiction under the 1946 Declaration, explained his reasons for nevertheless participating in the decision on merits arising under that head of jurisdiction in 1986 ICJ REP. at 181-82, para. 2 of his separate opinion.

³³ Judge Lachs; see 1986 ICJ REP. at 170-71, pt. III of his separate opinion.

³⁴ Intervention was allowed in *Haya de la Torre (Colom. v. Peru)*, 1951 ICJ REP. 71 (Judgment of June 13). It was refused, after hearing, in *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application to Intervene, 1981 ICJ REP. 3 (Judgment of Apr. 14), and *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, 1984 ICJ REP. 3 (Judgment of Mar. 21). The application of Fiji to intervene in *Nuclear Tests* became moot. Application to Intervene, 1974 ICJ REP. 530, 535 (Orders of Dec. 20).

encourages interventions, the primary disputing states may prefer ad hoc arbitration, where intervention is not possible. By summarily refusing interventions without granting a hearing, as it did in this case, justice is not seen to be done.³⁵

CONCLUSION

The above comments look forward—to the issues that the case raises for the shaping of an international legal order for the future. I have intentionally not dealt with the underlying jurisdictional issues of the case, the factual controversies or the application of the law to the facts of the particular situation, but that silence should not be taken as agreement. The more general issues should attract scholarly discussion. They are not new. The creation of new international legal norms is a matter of general and continuing interest that transcends the boundaries of particular subfields of international law. The standards for the legitimate use of force have engaged that discussion since the inception of the debate over the definition of aggression and will continue to do so. For those concerned with the future role of the Court, the more procedural issues will also be of interest.

FRED L. MORRISON*

THE OTHER SHOE FALLS: THE FUTURE OF ARTICLE 36(1) JURISDICTION IN THE LIGHT OF *Nicaragua*

In the wake of the 1984 Judgment of the International Court on jurisdiction and admissibility issues in the *Nicaragua* case,¹ the United States reviewed the utility and desirability of continued participation in the optional jurisdictional regime established by Article 36(2) of the Statute of the International Court of Justice.² The Executive concluded essentially that the experiment initiated by the regime neither had succeeded nor was likely to succeed in the future; that its subscription was ragged and asymmetrical in terms of world politics; that the Court, the custodian of this mode of jurisdiction, had adopted new theories of interpretation that were inconsistent, in the U.S. view, with the thrust of the provision; that the Court itself had changed; and that, in sum, continued United States participation would dis-

³⁵ See Sztucki, *Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The "Salvadoran Incident,"* 79 AJIL 1005 (1985); Chinkin, *Third-Party Intervention before the International Court of Justice*, 80 AJIL 495 (1986).

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¹ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26). For the text of the U.S. Statement on withdrawal from the case, see DEP'T ST. BULL., No. 2096, March 1985, at 64, *reprinted in* 24 ILM 246 (1985).

² Declaration of Aug. 14, 1946, 61 Stat. 1218, TIAS No. 1598, 1 UNTS 9.

criminate against United States interests while contributing nothing to world order.³ Accordingly, on October 7, 1985, the Secretary of State informed the Secretary-General of the United Nations that the United States was terminating, in accord with the terms of its Declaration and the provisions of the Statute, its adherence to the optional regime under Article 36(2) of the ICJ Statute.⁴

The U.S. response addressed national policy with regard to the Court's jurisdiction under Article 36(2). But the Judgment of November 26, 1984 had rested jurisdiction on both paragraphs 1 and 2 of Article 36.⁵ Nicaragua, it will be recalled, had belatedly invoked Article XXIV of the 1956 Nicaragua-United States Treaty of Friendship, Commerce and Navigation (the FCN Treaty).⁶ Paragraph 2 of that provision provides: "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other specific means."⁷ In the 1984 phase, the Court simply concluded that "there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, *inter alia*, as to the 'interpretation or application' of the [FCN] Treaty."⁸

Article XXI(1)(d) of the Treaty removes virtually all the key items in Nicaragua's Application from the jurisdiction of the Court.⁹ It provides, in relevant part, that "[t]he present Treaty shall not preclude the application of measures: . . . (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests"¹⁰ This provision was not mentioned by the Court. Though Article XXIV(1) as well as customary international law prescribes negotiation as a prerequisite to the unilateral initiation of adjudication, the Court found that Nicaragua had discharged that requirement in substance, if not in form.¹¹

In its Judgment on the merits of June 27, 1986,¹² the Court made certain adjustments and retrofittings in its jurisdictional decision. It went through the motions of qualifying a theretofore rather dismissive treatment of the multilateral treaty reservation in the United States optional Declaration.¹³

³ See generally Dep't of State Press Statement, 24 ILM 1743 (1985).

⁴ See Contemporary Practice of the United States, 80 AJIL 163-65 (1986).

⁵ 1984 ICJ REP. at 442, para. 113.

⁶ *Id.* at 426-27, para. 80. See also Separate Opinion of Judge Oda, *id.* at 472, 472.

⁷ Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, Nicar.-U.S., 9 UST 449, TIAS No. 4024, 367 UNTS 3 (entered into force May 25, 1958).

⁸ 1984 ICJ REP. at 428, para. 83.

⁹ See Dissenting Opinion of Judge Schwebel, *id.* at 558, 635; see also Reisman, *Has the International Court Exceeded its Jurisdiction?*, 80 AJIL 128, 130-31 (1986).

¹⁰ Treaty of Friendship, Commerce and Navigation, *supra* note 7.

¹¹ 1984 ICJ REP. at 428, para. 83.

¹² Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 38, para. 56 (Judgment of June 27).

¹³ 1984 ICJ REP. at 425-26, paras. 75-76.

But this was, in fact, a *démarche* in appearance only, as the Court then proceeded to declare that the customary law and conventional law invoked in the case were identical.¹⁴ The Court confirmed its holding of jurisdiction allegedly established under Article 36(1) of the Statute by the FCN Treaty.¹⁵ It brushed aside the manifest exclusions in Article XXI(1)(d) in a single brief paragraph, in an argument consisting entirely of a superficial comparison between the text in the Treaty and a comparable text in the General Agreement on Tariffs and Trade.¹⁶ Moreover, it substantially expanded the ambit of the jurisdictional clause of the Treaty by interpreting the Treaty broadly,¹⁷ even reaching "implied" matters that also became subject to that clause.¹⁸ In effect, virtually anything "unfriendly," even were it otherwise within the pale of lawful international action, was rendered unlawful because this was a treaty of "friendship."¹⁹

It is not the purpose of this Note to criticize the reasoning or the quality of judgment of the Court in this matter. The reader may find a range of views and cogent analyses amid the dissenting opinions.²⁰ This Note examines the implications of the Judgment with regard to the extensive United States practice of using the Article 36(1) mode of jurisdiction and to ask whether the Judgment of June 27, 1986 requires a reconsideration of U.S. attitudes.

I.

The Statute of the International Court of Justice provides for both advisory and contentious jurisdiction.²¹ In its advisory mode, the Court acts as a type of international constitutional tribunal²² and as a *cour de cassation* for international organizations that have been authorized to state questions to it.²³

In its contentious jurisdictional mode, the Court resolves issues between states. These latter disputes may be referred to the Court in one of three ways. One of these, the optional regime (Article 36(2)), is a type of aleatory jurisdiction, in which states deposit general declarations with the Secretary-General of the United Nations about the matters they are willing to adjudicate with another state making a similar declaration. Thereafter, a declaring state may initiate a case unilaterally against any other comparably declaring state without securing its special consent to the adjudication and without invoking an independent treaty clause. Article 36(2) jurisdiction is an innovative and experimental form, made possible by the continuity of the

¹⁴ 1986 ICJ REP. at 92 ff., para. 172 *et seq.*

¹⁵ *Id.* at 115-16, para. 221.

¹⁶ *Id.* at 116, para. 222.

¹⁷ *Id.* at 135 ff., para. 271 *et seq.*

¹⁸ *Id.* at 138, para. 276.

¹⁹ *Cf. id.* at 136-37 and 138, paras. 273 and 275.

²⁰ See especially the Dissenting Opinions of Judges Oda and Schwebel, *id.* at 212 and 259, respectively.

²¹ Art. 36, Statute of the International Court of Justice, ICJ ACTS AND DOCUMENTS, No. 4 (1978).

²² See, e.g., Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), 1962 ICJ REP. 151 (Advisory Opinion of July 20).

²³ See, e.g., Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 ICJ REP. 325 (Advisory Opinion of July 20).

International Court and its predecessor, the Permanent Court. But it has rarely been used and, in the light of the United States withdrawal and subsequent events, will probably decline further.

The more durable forms of the Court's jurisdiction are essentially a continuation of traditional arbitral forms. Article 36(1) provides: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Article 36(1) contemplates two modes of engaging the contentious jurisdiction of the Court. One, by special agreement ("all cases which the parties refer to it"), may be called "special agreement jurisdiction." The other, comprising general agreements contemplating disputes within or about particular treaty regimes ("all matters specially provided for . . . in treaties and conventions in force"), may be referred to as "treaty-based jurisdiction."

II.

The United States is a major consumer of treaty-based jurisdiction under Article 36(1); according to the most recent *ICJ Yearbook*, Article 36(1) jurisdiction is incorporated in some 35 bilateral treaties to which the United States is party.²⁴ Moreover, the Senate is currently considering two more treaties that will incorporate the Court's treaty-based jurisdiction.²⁵ The United States also participates in a large number of multilateral treaties that incorporate Article 36(1) jurisdiction.²⁶ Even after the termination of Article 36(2) jurisdiction, the Department of State apparently continued to view Article 36(1) treaty jurisdiction as a desirable and important form of dispute resolution in treaties with commercial or other limited subject matter.

The doctrine of limited subject matter jurisdiction in these treaties is an important feature of their attractiveness and is central to decisions to use the International Court. The United States, like all other governments, views adjudication as only one of a number of facultative options available to states for the resolution of their disputes. In the absence of an affirmative choice by a state, adjudication in international law is not mandatory.²⁷ Some states lawfully refuse to adjudicate anything. Others agree to selected matters. A state is entitled to refuse to agree in advance to either a treaty-based or a special agreement invitation to adjudicate matters that it thinks would be better treated in other modes of dispute resolution. In much the same way that many declarations made under Article 36(2) carefully and lawfully circumscribe the matters that the declaring state wishes to submit to the jurisdiction of the Court, clauses within treaties that establish jurisdiction under

²⁴ 1984-1985 ICJ Y.B. 102-18. For a list of the FCN treaties, see also List of Treaties of Friendship, Commerce and Navigation, 1980 ICJ Pleadings (United States Diplomatic and Consular Staff in Tehran) 233-34 (Ann. 51 to U.S. Memorial).

²⁵ Trademark Registration Treaty, S. EXEC. DOC. H, 94th Cong., 1st Sess. (1975); Vienna Convention on the Law of Treaties, S. EXEC. DOC. L, 92d Cong., 1st Sess. (1971).

²⁶ 1984-85 ICJ Y.B., *supra* note 24.

²⁷ *But cf.* Corfu Channel Case, Preliminary Objection, 1948 ICJ REP. 15, 27 (Judgment of Mar. 25).

Article 36(1) are designed to operate only for those matters that the treaty parties are explicitly agreeing to submit. This "presumption of confinement," so to speak, is basic to the use of the treaty-based mode.

The presumption of confinement was a central and explicit consideration in U.S. decisions to use the International Court in the growing genre of FCN treaties. To cite an example: a State Department memorandum dealing with the dispute settlement provisions of a particular FCN treaty, which had already been pleaded before the Court, expresses the presumption unequivocally:

The compromissory clause . . . is limited to questions of the interpretation or application of this treaty; i.e., it is a special not a general compromissory clause. It applies to a treaty on the negotiation of which there is voluminous documentation indicating the intent of the parties. This treaty deals with subjects which are common to a large number of treaties, concluded over a long period of time by nearly all nations. Much of the general subject-matter—and in some cases almost identical language—has been adjudicated in the courts of this and other countries. The authorities for the interpretation of this treaty are, therefore, to a considerable extent established and well known. Furthermore, certain important subjects, notably immigration, traffic in military supplies, and the "essential interests of the country in time of national emergency", are specifically excepted from the purview of the treaty. In view of the above, it is difficult to conceive how Article XXVIII (the dispute resolution clause in the FCN treaty with China) [the treaty on which the memorandum is based], could result in this Government's being impleaded in a matter in which it might be embarrassed.²⁸

Another State Department memorandum on provisions in commercial treaties relating to the International Court addressed the same issue:

This paper . . . points out a number of the features which in its view make the provision satisfactory These include the fact that the provision is limited to differences arising immediately from the specific treaty concerned, that such treaties deal with familiar subject-matter and are thoroughly documented in the records of the negotiation, that an established body of interpretation already exists for much of the subject-matter of such treaties, and that such purely domestic matters as immigration policy and military security are placed outside the scope of such treaties by specific exceptions.²⁹

Both memoranda were pleaded to the Court in the U.S.-Iranian case and were reproduced in Judge Schwebel's dissent to the merits decision.³⁰ It is quite clear from these memoranda, and, indeed, from the concerns of any government contemplating adjudication, that the incorporation of Article 36(1) jurisdiction in American FCN treaties was premised on the assumption

²⁸ Memorandum on Dispute Settlement Clause in Treaty of Friendship, Commerce and Navigation with China (n.d.), reproduced in 1980 ICJ Pleadings, *supra* note 24, at 234, 235 (Ann. 52 to U.S. Memorial).

²⁹ Dep't of State, Memorandum on Provisions in Commercial Treaties relating to the International Court of Justice (n.d.), reproduced in 1980 ICJ Pleadings, *supra* note 24, at 236, 237.

³⁰ 1986 ICJ REP. at 307-08, para. 101.

that such jurisdiction would be confined to the explicit terms of the treaty. Certain subject matter deemed to be of special domestic concern and, in particular, matters of military security were not, in the U.S. view, any part of the jurisdictional bargain. Indeed, had the Court in *Nicaragua* engaged in an international legal interpretation of the FCN Treaty even faintly approximating what is prescribed in Article 31 of the Vienna Convention on the Law of Treaties, it would have found it impossible to ignore this manifest expectation.

III.

The Judgment of June 27, 1986 has effectively shattered key elements of the presumption of confinement. The Court reaffirms its earlier decision of seisin under the FCN Treaty³¹ and then proceeds, as mentioned, to dispose of the restrictive clause in the Treaty in a single paragraph and in a procedure that hardly qualifies as a paragon of interpretation.³² The Court concedes that the effect of Article XXI of the FCN Treaty is to reserve certain matters from the Court's jurisdiction, but holds that the determination of whether a matter is excluded is not within the unilateral competence of the state party. It is to be decided by the Court.³³ In making that determination, the Court may assume that the measures in question are related to the essential security interests of the state concerned, but even then it will determine "whether the risk run by these 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary'."³⁴

One key element in the presumption of confinement is thus terminated. While the United States may have thought that the insertion of words in Article XXI of the Nicaragua-U.S. FCN Treaty and comparable words in the other treaties of this genre effectively excluded military matters, it now learns that the prevailing theory of jurisdiction holds that these words are no more than an initial claim by the United States that will be tested by the Court in terms of its own view of their contextual necessity and reasonableness.

A second element of the presumption of confinement concerns explicit subject matter. The memoranda of the United States considered above indicate clearly that it was assumed that only matters that were explicitly within the four corners of the treaty in question and not reserved were to be subject to the jurisdictional clause. The Court, however, develops a theory of implication: "there are certain activities of the United States which are such as to undermine the whole spirit of a bilateral agreement directed to sponsoring friendship between the two States parties to it."³⁵ The Court extends this notion of implication in the following paragraph:

A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other

³¹ See note 15 *supra* and accompanying text.

³² See note 16 *supra* and accompanying text.

³³ See note 17 *supra* and accompanying text.

³⁴ 1986 ICJ REP. at 117, para. 224.

³⁵ *Id.* at 138, para. 275.

specific legal obligation; but where there exists such a commitment, of the kind *implied* in a treaty of friendship and commerce, such an abrupt act of termination of commercial intercourse as the general trade embargo of 1 May 1985 will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty.³⁶

Thus, a second part of the presumption of confinement on which the jurisdictional clauses of United States FCN treaties have rested has been shattered.

IV.

Students of international law are inclined to study the problem of the jurisdiction of the International Court of Justice from a developmental perspective. More jurisdiction is better; decisions that enhance jurisdiction are the most worthy of applause. The consumers of international adjudication, governments and, more specifically, their international legal advisers, necessarily look at jurisdiction from a different angle. Because adjudication in international law is only one of a number of optional dispute resolution mechanisms, legal advisers must consider its appropriateness for their government in terms of the nature of the dispute, the attitude of the potential adversary with regard to adjudication, the alignments of judges on the Court, the extent to which the countries from which they come have critical interests in the potential dispute or parallel interests in cognate disputes, and so on. Because adjudication has certain properties that, in different contexts, may discriminate in favor of or against one of the parties, responsible legal advisers must decide carefully which bilateral matters should be made subject to an adjudicative jurisdictional clause and which should be reserved for other dispute-resolving modalities. That thoroughly legitimate national policy decision is meaningful only if the presumption of confinement operates and is interpreted in good faith. *Nicaragua* has cast this essential condition into doubt.

The question the United States must urgently address is whether, all things considered, it can afford voluntarily to subject itself to this essentially new regime. Variants of the "Portuguese Gambit"³⁷ or "Hit and Run" that have been examined in the context of Article 36(2) are possible in jurisdictional clauses under Article 36(1). Changes of government and international political alignment in the other treaty partners may make jurisdictional clauses attractive political instruments for new governments to use against the United States in matters only distantly related to the FCN treaty or to the intentions of the parties; this has been rendered relatively easy, as the Court is apparently willing to introduce a great deal under the hardly uncommon term of international political parlance, "friendship." In less extreme cases, moderate governments may find it useful to develop ICJ cases that exceed the U.S. understanding of the confined jurisdictional clause, for

³⁶ *Id.*, para. 276 (emphasis added). One may note that the Court is quite wrong here on the law. See Dissenting Opinion of Judge Oda, *id.* at 249-50, para. 80.

³⁷ W. M. REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 379-83 (1971).

bargaining purposes or to assuage an exigent domestic constituency to whom the issue may be of concern.

That contingencies such as these are not the products of a feverish imagination is confirmed by the case brought by Nicaragua. That the International Court is willing to reach out and accept such cases under innovative conceptions of its jurisdiction is now twice confirmed. In view of these developments, the United States would do well to undertake reconsideration of its wide-ranging use of the Article 36(1) mode of jurisdiction, before there are unpleasant surprises.

W. MICHAEL REISMAN*

LE PEUPLE, C'EST MOI! THE WORLD COURT AND HUMAN RIGHTS

This essay examines the discussion of human rights and domestic jurisdiction by the International Court of Justice in the *Nicaragua* case.¹ Independently of the final verdict about the lawfulness of U.S. help to the contras under principles of either self-defense or humanitarian intervention, the Court's views on the relationship among human rights, domestic jurisdiction and intervention are wrong in law. Furthermore, the philosophical assumptions of the Judgment are profoundly disturbing. For the reasons set forth below, I submit that the Court's approach embodies a backward view of international law and justice that was totally unnecessary to the resolution of the case.

The Court discussed the U.S. contention that the Government of Nicaragua had breached commitments to the Nicaraguan people, to the Organization of American States and to the United States with regard to Nicaraguan domestic policies.² These included "questions such as the composition of the government, its political ideology and alignment, totalitarianism [and] human rights."³ The Court then made the following general statement:

[These] questions . . . are questions of domestic policy. The Court would not therefore normally consider it appropriate to engage in a verification of the truth of assertions of this kind A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems. Consequently, there would normally be

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¹ Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 ICJ REP. 14 (Judgment of June 27). I do not address here the legality of the actions undertaken by the United States, especially those involving the use of force for human rights purposes.

² 1986 ICJ REP. at 130-35, paras. 257-69. For Congress's formal findings that Nicaragua had breached its human rights obligations, see H.R. REP. NO. 237, 99th Cong., 1st Sess. 63-73 (1985), reproduced in pertinent part in *id.* at 90-92, paras. 169-70.

³ 1986 ICJ REP. at 130, para. 257.

no need to make any enquiries . . . to ascertain in what sense and along what lines Nicaragua has actually exercised its right.⁴

This paragraph could be read as merely reaffirming the innocuous tautology that a state is free to do what it is free to do. However, the Court goes further: it establishes the *presumption* that human rights and totalitarianism, inter alia, are exclusive domestic matters and, as such, are shielded in principle from judicial inquiry. The crucial issue becomes whether human rights (and "totalitarianism," insofar as it has human rights implications) fall within Nicaragua's exclusive jurisdiction in the absence of any formal commitment. Addressing itself to the human rights issue, the Court wrote:

Nicaragua is accused by the 1985 finding of the United States Congress of violating human rights. This particular point requires to be studied independently of the question of the existence of a "legal commitment" by Nicaragua towards the Organization of American States to respect these rights; the absence of such a commitment would not mean that Nicaragua could with impunity violate human rights. However, where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves.⁵

These two portions of the opinion are quite ambiguous. The Court may mean two different things here. On one reading, the Court may be saying that there are no human rights obligations apart from treaty or other formal commitments. This interpretation is suggested by three factors. First, the Court held that human rights fall within states' domestic jurisdiction unless there is some "obligation of international law" to the contrary.⁶ Second, the Court placed strong emphasis on the inexistence of a human rights commitment by Nicaragua, which seems to suggest that where there is no commitment or treaty, there are no human rights duties.⁷ Finally, the Court held that human rights may only be monitored through treaty mechanisms. Under this interpretation, the reason why the Court thought that Nicaragua could not "with impunity violate human rights" is *not* that there is a customary law of human rights *en dehors* formal commitments, but rather that Nicaragua is bound by the human rights conventions, in particular by the American Convention on Human Rights.⁸ Nicaragua thus must observe human rights solely as a matter of treaty obligation.

This position is truly stunning, at least for those of us who thought that the law of human rights was already part of the corpus of international law. It must be emphasized that the Court was not inquiring here into what matters may or may not legally be coerced by foreign *intervention*, armed or

⁴ *Id.* at 130-31, para. 258.

⁵ *Id.* at 134, para. 267.

⁶ See text accompanying note 4 *supra*.

⁷ See text accompanying notes 28-42 *infra*.

⁸ American Convention on Human Rights, opened for signature Nov. 22, 1969 (entered into force July 18, 1978), reprinted in ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L/V/II.60, Doc. 28, at 29 (1983).

otherwise. Rather, the Court denied, as a matter of principle, *its own power* to discuss human rights and totalitarianism because, absent some commitment, they "essentially" fell within the domestic jurisdiction of Nicaragua. If this is what the Court meant, the Court brushed aside one of the most cherished modern conquests of mankind: the notion that governments are *not* free to treat their citizens as they please, even if they are not parties to specific human rights conventions. That view ignores precedent,⁹ United Nations practice,¹⁰ regional practice,¹¹ state practice,¹² scholarly writing¹³ and world opinion.¹⁴ At the very least, it must be recognized that the human rights provisions of the UN Charter,¹⁵ in conjunction with post-1945 state practice, had the effect of generating a *customary* obligation for governments to respect human rights.¹⁶ Which human rights obligations are imposed upon states by customary law and which are instead only a matter of treaty

⁹ As Judge Schwebel reminded the Court, the "essentialist" meaning of Article 2(7) was long ago rejected by the Court's own precedent. *See* Nationality Decrees Issued in Tunis and Morocco, 1923 PCIJ, ser. B, No. 4, at 7, 24 (Advisory Opinion of Feb. 7). *See also* Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 ICJ REP. 16, 57 (Advisory Opinion of June 21) (referring to the binding force of the Charter provisions). Here the Court is applying customary law because of the U.S. multilateral treaty reservation; *see further* note 16 *infra* and accompanying text.

¹⁰ *See* M. RAJAN, *THE EXPANDING JURISDICTION OF THE UNITED NATIONS* 98-123 (1982); R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); and G. J. JONES, *THE UNITED NATIONS AND THE DOMESTIC JURISDICTION OF STATES* 33-65 (1979).

¹¹ *See* American Convention on Human Rights, *supra* note 8; European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 222; African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3, Rev.5 (1981), *reprinted in* 31 ILM 58 (1982). When one adds the impact of these conventions to the widespread acceptance of the Universal Declaration of Human Rights, there is little doubt about their contribution to the development of customary law on the subject.

¹² States bound by specific human rights conventions do not confine their human rights claims to the parties to those conventions. Examples are the Helsinki process and the Carter administration's offensive on the Soviet human rights situation.

¹³ *See generally* CENTER FOR THE STUDY OF HUMAN RIGHTS, *HUMAN RIGHTS: A TOPICAL BIBLIOGRAPHY* (1983); Vincent-Daviss, *Human Rights Law: A Research Guide to the Literature*, Parts I, II & III, 14 N.Y.U.J. INT'L L. & POL. 209 (1981), *id.* at 487 (1982); and 15 *id.* at 211 (1982), respectively. For non-English-language works, *see* PUBLIC INTERNATIONAL LAW (published periodically by the Max Planck Institute).

¹⁴ Attested to by the success and growth of nongovernmental human rights organizations. *See, e.g.,* Rodley, *Monitoring Human Rights in the 1980s*, in *ENHANCING GLOBAL HUMAN RIGHTS* (J. Dominguez, N. Rodley, B. Wood & R. Falk eds., 1979).

¹⁵ Arts. 1(3) and 55.

¹⁶ Seen in the light of the impressive subsequent development of human rights law, the human rights articles of the Charter constitute a paradigmatic example of the kind of treaty rule defined by the Court in its leading case on custom as a "norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law . . . so as to become binding even for countries which have never . . . become parties to the [treaty]." *North Sea Continental Shelf Cases* (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 41 (Judgment of Feb. 20). *Cf.* D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982) (arguing, *inter alia*, that because of the generalization of provisions in human rights conventions nations are now customarily entitled to request human rights observance).

or other formal commitments is, of course, open to question.¹⁷ Yet the Court's broad assertion is unwarranted and does not represent international law as it stands at present.¹⁸

The other possible interpretation of these two excerpts is that regardless of the source of human rights obligations, where there is a convention, the *protection* of those rights takes the *form* of those arrangements provided for in the convention. This milder interpretation is supported by the encouraging dicta that the human rights issue needed to be studied separately from the existence of a legal commitment, and that Nicaragua "could not with impunity violate human rights." Taken together, they may mean that Nicaragua is bound after all by a law of human rights apart from formal commitments. However, the Court concluded that the United States may not demand human rights observance of the Nicaraguan Government because the United States is not a party to the human rights conventions.¹⁹ The Court specifically held that with regard to the political pledge of Nicaragua regarding its domestic policies, including human rights, only the OAS organs were entitled to monitor its compliance. The Court observed that the mechanisms provided for in the American Convention "have functioned" and that the OAS could have taken action, if it so wished, on the basis of these reports.²⁰ The human rights conventions to which Nicaragua is a party contain their own mechanisms to monitor compliance; therefore, only the organs established by those mechanisms following the treaty procedures have legal standing to demand observance of human rights by the Nicaraguan Government.

This interpretation, while more favorable to the human rights cause than the first one, is still indefensible. It leads to the absurd result that when a state becomes a party to a human rights convention, that state is thereafter sheltered from the monitoring mechanisms provided by general international law.²¹ Under this backward-looking theory, if a dictatorial government ratifies a human rights treaty, nonparties automatically lose their *locus standi* to ask that government to stop ongoing human rights deprivations. Even parties themselves can only request such compliance through the procedures

¹⁷ In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a U.S. court held, *inter alia*, that official torture, but not necessarily other human rights violations, was prohibited by *customary* international law. It does not follow, however, that the analysis by the International Court, whose function is to decide controversies by applying international law, need be as restrictive as that of a U.S. federal court, which is subject to well-known constitutional constraints in the interpretation and application of customary international law.

¹⁸ Perhaps the Court should have first distinguished among the different matters it mentioned (composition of the government, ideology, alignment and human rights) to determine separately which of those fell within Nicaragua's exclusive domestic jurisdiction.

¹⁹ The United States has signed, but not yet ratified, a number of human rights conventions, including the American Convention.

²⁰ 1986 ICJ-REP. at 134, para. 267. The formalism of the Court is evident in the assertion that the inter-American mechanisms "have functioned" in the case of Nicaragua; the Court meant only that the Commission visited Nicaragua and compiled reports, not that the human rights situation in Nicaragua had improved. On the latter, see *infra* note 53.

²¹ These accepted general mechanisms of human rights enforcement include diplomatic pressure, moral and political support for the pro-human rights opposition, economic sanctions and various kinds of proportionate nonarmed countermeasures.

established by the convention, no matter how weak and ineffective. This reasoning was rejected by the UN Third Committee and the General Assembly in the Chilean case. The Chilean representative sought to block UN condemnation on the grounds that the only valid mechanisms to monitor human rights in Chile were those provided for by the International Covenant on Civil and Political Rights, to which Chile was a party.²² The weakness of the Chilean argument resides in the fact that the undisputed object of any human rights convention is to *strengthen* the human rights obligations of the parties. Any interpretation that would diminish the obligation of the parties to respect those rights and freedoms or restrict the competence of other organs dealing with human rights would be contrary to that object.²³ Therefore, the United States does not lose its standing to demand compliance from Nicaragua just because Nicaragua is a party to the American Convention on Human Rights.

Another source of concern for those committed to human dignity is the Court's hasty dismissal of the U.S. claim that Nicaragua may be en route to establishing a totalitarian dictatorship.²⁴ Yet if the political system described as "totalitarian dictatorship" results in a consistent pattern of gross violations of internationally recognized human rights,²⁵ then that system cannot validly be "chosen" by a state.²⁶ A state cannot legally "choose" to violate human rights. Above all, the Court is not deciding here a legal issue that may be

²² Shortly after the Chilean junta overthrew and murdered President Allende, the UN Commission on Human Rights established an Ad Hoc Working Group to inquire into the Chilean situation. See Bossuyt, *The United Nations and Civil and Political Rights in Chile*, 27 INT'L & COMP. L.Q. 462, 463 (1978). The representative of Chile challenged the competence of the working group, insisting that it was not a state and not a party to the International Covenant on Civil and Political Rights, which Chile had ratified, and that Chile could not accept that bodies extraneous to it should claim to exercise powers not vested in them by the Covenant. See UN Docs. A/C.3/31/6 and A/C.3/31/SR.46, para. 19 (1976). That position was rejected in the Third Committee (Bossuyt, *supra*, at 463-66) and ignored by the General Assembly, which routinely acknowledges or commends the group's reports in its resolutions condemning the human rights situation in Chile. See, e.g., GA Res. 38/102, 38 UN GAOR Supp. (No. 47) at 205, 206, UN Doc. A/38/47 (1983).

²³ See Bossuyt, *supra* note 22, at 465.

²⁴ The Court made the observation quoted in the text at note 44 *infra*, and then added: "Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding [i.e., totalitarian dictatorship], cannot justify on the legal plane the various actions of the Respondent complained of." 1986 ICJ REP. at 133, para. 263 (emphasis added).

²⁵ The requirement of a "consistent pattern of gross and reliably attested violations of human rights" as a necessary condition for raising international concern was developed by UN practice, starting with Resolution 1503 (XLVIII) adopted in 1970 by the Economic and Social Council, 48 UN ESCOR Supp. (No. 1A) at 8, UN Doc. E/4832/Add.1 (1970).

²⁶ One could perhaps agree in principle with the Court's assertion if by "totalitarianism" the Court meant just a value-charged label for a particular political system or religion, e.g., socialism or the African one-party system or Moslem fundamentalism, and not a system where the government violates internationally recognized human rights. Thus, it is, of course, not unlawful for the USSR to have a socialist system, but the Soviet Government's internment of political dissidents and prohibition of Jewish emigration are in breach of the USSR's international duties. See generally Dinstein, *The International Obligations of the U.S.S.R. in the Field of Human Rights*, 15 SOVIET JEWISH AFF. 165 (1985).

narrowly dependent on the complex Nicaraguan situation. Ignoring its own well-established guidelines of judicial prudence,²⁷ the Court instead laid down the principle that establishing a "totalitarian dictatorship" is within a state's "free choices," independently of whether or not a particular instance of "totalitarianism" could withstand the human rights test.

The Court then paused to examine whether Nicaragua may have bound itself by agreement to implement certain domestic policies, including commitments to democracy and human rights.²⁸ In principle, the Court found no obstacle in international law to prevent a state from making a commitment of this kind.²⁹ However, the Court regarded Article 3(d) of the OAS Charter as a political rather than a legal undertaking.³⁰ As a preliminary matter, the presumption should be that provisions inserted in treaties in force must produce some legal effect, and any conclusion to the contrary must be supported by detailed argument, including a review of the *travaux préparatoires* of the OAS Charter and an assessment of the interplay between Article 3(d) and the corpus of inter-American human rights law.³¹ But even if one concedes that under proper treaty analysis the OAS Charter has not established a definite legal obligation for each American state to have a democratic system, the Court's approach still reveals an alarming insensitivity toward the general purposes and underlying philosophy of the OAS system. Representative democracy has always been a basic purpose of the inter-American system, even before the San José Pact came into existence.³² Liberal de-

²⁷ Examples of the Court's avoiding the formulation of broad principles unnecessary to the disposition of the case at hand are numerous. See, e.g., *Nuclear Tests (Austl. v. Fr.)*, 1974 ICJ REP. 253, 263 (Judgment of Dec. 20) (avoiding declaratory judgment on lawfulness of nuclear explosions). The Court's frequent use of ellipsis, once criticized by Judge Lauterpacht, was perhaps called for in the *Nicaragua* case.

²⁸ There is no difference, for the purposes of this essay, between the obligation to respect human rights and a commitment to install a liberal democracy: the latter is *also* a human rights commitment. Yet whether a government violates just that commitment or engages in more substantial human rights deprivations has crucial consequences in terms of the lawfulness of countermeasures. The humanitarian intervention argument was expressly rejected by the Court in unduly broad terms. See 1986 ICJ REP. at 134-35, para. 268. Nevertheless, the ruling should not affect (1) the lawfulness of nonmilitary countermeasures for human rights purposes; and (2) the use of force to remedy egregious human rights violations. Whether either of those situations is an accurate description of the U.S. efforts in Nicaragua is a different matter on which there is substantial disagreement.

²⁹ 1986 ICJ REP. at 131, para. 259. This concession is, of course, completely fictitious: to hold otherwise would have been nothing short of extravagant. See the Joint Declaration on Fundamental Rights by the EEC Council, Parliament and Commission of Apr. 5, 1977, in which the heads of state of the EEC members declared that respect for and preservation of representative democracy and human rights in each of the members is an essential element of EEC membership. 1978 BULL. EUR. COMM., No. 3, at 5. For a similar requirement in the projected Argentine-Brazilian common market, see *infra* note 32; and on the Council of Europe, see 1986 ICJ REP. at 383, para. 245 (Schwebel, J., dissenting).

³⁰ Judgment, 1986 ICJ REP. at 131, para. 259. Art. 3(d) reads: "The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy."

³¹ See Arts. 31 and 32, Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27, at 289 (1969).

³² See American Declaration on the Rights and Duties of Man, Res. XXX of the Ninth International Conference of American States (1953), reprinted in 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, pt. 1, ch. 4, at 1 (T. Buergenthal & R. Norris eds. 1984), and the impressive

mocracy is not just one possible system of government among many toward which inter-American institutions are neutral, as it perhaps would be in other regions of the world.³³ The Court completely failed to account for that general purpose of the inter-American system.³⁴

The decision is also deficient in its treatment of the *specific* acts that might have legally obliged the Nicaraguan Government to establish a democratic system based on respect for human rights.³⁵ It is well established in the Court's jurisprudence that declarations made by states "by way of unilateral acts . . . may have the effect of creating legal obligations."³⁶ Nevertheless, the Court concluded that it was "unable to find anything in these documents [the OAS resolution and the Nicaraguan communication] from which it can be inferred that any legal undertaking was intended to exist."³⁷ The Court's disposition of this issue needs to be quoted *in extenso*:

Moreover, the Junta made it plain . . . that its invitation to the Organization of American States to supervise Nicaragua's political life should not be allowed to obscure the fact that it was the Nicaraguans themselves who were to decide upon and conduct the country's domestic policy. The resolution of 23 June 1979 also declared that the solution of their problems is a matter "exclusively" for the Nicaraguan people, while stating that the solution was to be based (in Spanish, *debería in-*

list of human rights-related declarations, resolutions and recommendations of inter-American conferences and meetings of consultation in *id.*, pt. 1, ch. 5, at 1-195, spanning an 80-year period. See generally Cabranes, *The Protection of Human Rights by the Organization of American States*, 62 AJIL 889 (1968). The region may be moving toward requiring democracy as a condition for full membership, as in Western Europe. For example, in a recent unprecedented step, the Presidents of Argentina and Brazil declared that the projected common market will be open only to democratic nations. See N.Y. Times, Aug. 12, 1986, at A20, col. 1. Treaties provide further evidence that liberal democracy is presupposed in the scheme of human rights protection in the Americas. In addition to Article 23 (right to participate in government), see, e.g., Articles 15, 16 and 22 of the American Convention, *supra* note 8.

³³ See, e.g., American Convention, *supra* note 8, Preamble (mentioning the "framework of democratic institutions" as necessary to protecting human rights), and Art. 23 (mandating representative democracy). Cf. African Charter, *supra* note 11, Preamble (which does not require democracy), and Art. 13 (which is much less mandatory and detailed than the inter-American counterpart).

³⁴ The Court retrenched itself behind the formalistic twin distinctions, political intentions vs. legal undertakings, and binding vs. nonbinding treaty provisions, ignoring well-established rules of treaty interpretation. See Art. 31(1), Vienna Convention, *supra* note 31 (treaties must be interpreted in the light of their object and purpose). The Court, however, did not hesitate to use broad interpretive guidelines in deciding that the United States had deprived the Treaty of Friendship, Commerce and Navigation with Nicaragua of its object and purpose. 1986 ICJ REP. at 135-38, paras. 270-76. See Judge Oda's criticism on this point, *id.* at 249-50, paras. 79-82 (Oda, J., dissenting). Interestingly, Nicaragua identified *nonintervention* as one of the basic purposes of the OAS system. Memorial of Nicaragua 168-72 (unpub.). Human rights are not mentioned even once.

³⁵ These include the resolution of the 17th Meeting of Consultation of Ministers for Foreign Affairs of the OAS. See REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF NICARAGUA, OEA/Ser.L/V/II.53, doc. 25, at 1-3 (1981), and the communication of July 12, 1979, sent by the Nicaraguan junta in the aftermath of the victory over the Somoza forces to the OAS Secretary-General, *id.* at 3-7; 1986 ICJ REP. at 88-89 and 131, paras. 167 and 260. This communication included a "Plan to Secure Peace," which stated the intention of the Nicaraguan Government to respect human rights and govern the country democratically.

³⁶ Nuclear Tests, 1974 ICJ REP. at 267.

³⁷ 1986 ICJ REP. at 132, para. 261.

spirarse) on certain foundations which were put forward merely as recommendations to the future government. This . . . is a mere statement which does not comprise any formal offer which if accepted would constitute a promise in law, and hence a legal obligation. Nor can the Court take the view that Nicaragua actually undertook a commitment to organize free elections, and that this commitment was of a legal nature. The . . . Junta . . . planned the holding of free elections . . . following the [OAS] recommendation . . . [but] [t]his was an essentially political pledge, made not only to the Organization, but also to the people of Nicaragua, intended to be its first beneficiaries. But the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections.³⁸

The Court's formalism here reaches unsurpassed proportions. International commitments, especially in areas so sensitive as those linked to type of government and domestic policies, rarely take the form of a "formal offer which if accepted would constitute a promise in law."³⁹ Certainly, the promises that the Court considered binding in the *Nuclear Tests Cases* were made in considerably less formal terms than the undertaking of the Nicaraguan junta.⁴⁰ The Court's view that Nicaragua's express consent to OAS recommendations was invalid because it did not comply with imaginary formalities required for synallagmatic compacts or unilateral promises is inconsistent with the Court's liberal approach to consent in other portions of the Judgment.⁴¹ It also reveals a complete misunderstanding of the nature and structure of international law.⁴²

³⁸ *Id.* (emphasis in original).

³⁹ In criticizing the Court on this point, Judge Ago aptly observed: "Je ne comprendrais pas . . . que les gouvernements réunis à l'Organisation des États américains aient accepté d'adopter une mesure aussi exceptionnelle que le retrait de la reconnaissance d'un gouvernement . . . 'légitime' [i.e., the Somoza Government], sans avoir une solide garantie qu'il serait remplacé par un gouvernement répondant précisément aux caractéristiques définies dans le plan de paix" *Id.* at 186, para. 12 (Ago, J., sep. op.).

⁴⁰ That statement by the French President read as follows: "the Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government's programme. He had indicated that French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last" 1974 ICJ REP. at 266. As Judge Schwebel points out, an international obligation need not be made in a particular form. Thus, there is considerable merit to his claim that the successful revolutionaries, by their conduct, assumed an international obligation that the Nicaraguan Government later failed to honor. 1986 ICJ REP. at 384-85, para. 248 (Schwebel, J., dissenting).

⁴¹ Particularly disturbing is the Court's consideration elsewhere of U.S. or Nicaraguan acquiescence or express consent as producing legal effect. See, e.g., 1986 ICJ REP. at 100, para. 189 (U.S. consent to resolution of inter-American organization); and especially at 107, paras. 203 and 204 (U.S. consent to GA resolutions). The Court was even undeterred by the express U.S. rejection of the binding nature of the resolution on intervention. *Id.*, para. 203. Moreover, in the jurisdictional phase, the Court attached great weight to Nicaragua's "constant acquiescence" as a factor for asserting its own jurisdiction, and dismissed the rather strong U.S. arguments that Nicaragua had never consented to the jurisdiction of the Court. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 396, 413, para. 47 (Judgment of Nov. 26). See Reisman, *Has the International Court Exceeded its Jurisdiction?*, 80 AJIL 128 (1985).

⁴² The Court then assumed, *arguendo*, that Nicaragua had made a legal and not a political commitment to democracy and free elections. Even then, said the Court, the United States

The Court's discussion of the human rights issue and the principle of nonintervention raises yet another fundamental question of a philosophical nature. The Court emphatically asserted that "[e]very State possesses a fundamental right to choose and implement its own political, economic and social systems."⁴³ When discussing the claim that the Sandinistas were attempting to install a totalitarian dictatorship, the Court said that even if the claim was true, "adherence by a State to any particular doctrine" does not violate international law, and that "to hold otherwise *would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.*"⁴⁴ It is for this reason that intervention is banned. The state has exercised a choice that only the state may exercise, and foreigners do not have a right to interfere with that choice. In fairness to the Court, this type of discourse is fairly common in international law.⁴⁵ But just what meaning can be given to the notion of the state's *freedom* to do something, and especially to *choose* a political system? And what, if any, are the facts denoted by such a notion?

The assumption made by classic international law and upheld by the Court is that states are somehow moral agents that are free and able to choose, just as individuals are free and able to make moral choices. I shall call this idea the Hegelian Myth.⁴⁶ As ingrained as it is in international law doctrine, the Hegelian Myth cannot survive critical scrutiny. The first objection is conceptual. The analogy of state to individual fails because words such as "freedom," "autonomy" and "equal liberty" have a different (and unclear) meaning when used for nation-states than they do for individuals. While we

would not have been justified in demanding the fulfillment of that obligation, because the commitment had been made not to the United States but to the OAS, which was alone empowered to demand its fulfillment. 1986 ICJ REP. at 132, para. 262. This position is simply an unexpected revival of the principle laid down in the Court's 1966 infamous decision in the *South West Africa Cases*. See *South West Africa (Ethiopia v. S. Afr.; Liberia v. S. Afr.) (Second Phase)*, 1966 ICJ REP. 6, 47 (Judgment of July 18). If that doctrine is rejected, and subsequent developments strongly indicate it should be (see, e.g., the *Namibia* decision, 1971 ICJ REP. at 57, 58 (apartheid flagrant violation of human rights provisions of UN Charter, which states have the duty to recognize)), and Nicaragua has indeed made a legal commitment to establish a democratic system and observe human rights, then the individual members of the OAS are perfectly entitled to request compliance. See 1986 ICJ REP. at 383, para. 246 (Schwebel, J., dissenting). The thrust of the Contadora process clearly confirms this view. See Joint Communiqué of the Seventh Joint Meeting of the Ministers for Foreign Affairs of the Contadora Group and of the Central American Countries, 24 ILM 187, 188 (1985); and Contadora Act on Peace and Co-operation in Central America (rev.), *id.* at 191, 195-96.

⁴³ 1986 ICJ REP. at 131, para. 258. This principle was exalted by President Nagendra Singh as a "sanctified absolute rule of law." *Id.* at 156, sec. IV (Nagendra Singh, J., sep. op.).

⁴⁴ 1986 ICJ REP. at 133, para. 263 (emphasis added).

⁴⁵ See, e.g., Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 25 UN GAOR Supp. (No. 28) at 121, UN Doc. A/8028 (1970). The Court placed exaggerated reliance on this nonbinding instrument. See, e.g., 1986 ICJ REP. at 99-100, para. 188.

⁴⁶ The Hegelian Myth is part of a broader cluster of moral assumptions examined in Luban, *The Romance of the Nation-State*, 9 PHIL. & PUB. AFF. 392 (1980).

know approximately what "free person" means, we are not clear about the notion of "a free government."⁴⁷ This is another instance of use of normative language in a context in which words do not, and cannot, retain their original descriptive meaning, although they do retain their emotive connotations.⁴⁸ The notion of individual autonomy, "in the sense fundamental to the idea of human rights, is a complex assumption about the capacities, developed or undeveloped, of persons, which enable them to act on . . . higher-order plans of action which take as their self-critical object one's life and the way it is lived."⁴⁹ Needless to say, these are human qualities. It is therefore impossible to articulate a concept of the state as a moral being analogous to a person.⁵⁰ Only persons can pursue rational ends and be autonomous in a moral sense, and we indeed have a moral duty not to interfere with their choices (unless those choices violate someone else's rights). But states are not persons, and although governments are made of persons, their moral rights qua governments are not grounded in any mystical quality of the state, as Hegel and the Court thought, but in the consent of their subjects.

The problem, however, is more than linguistic. A close examination of the notion of "state's choice" or "state's freedom" reveals the true facts denoted by that abuse of normative language. When the Court, following General Assembly Resolution 2625 (XXV), speaks about "freedom" of the state, it is articulating *a right of individuals in power to exercise whatever methods of government they choose to exercise, including authoritarian methods*. Thus, the assertion of a "fundamental right" of the state to "choose its political system" is no more than a defense of the legitimacy of *any* use of political power. The transmutation of words has now become a rationalization for oppression; the "freedom" ("independence," "sovereignty," "equal liberty") of the state means *carte blanche* for tyrants to exercise arbitrary power and deny individual freedom, that is, "freedom" in its original sense.⁵¹ The invariable consequence of the Hegelian Myth in international legal discourse is the confusion between government and people—le peuple, c'est moi!⁵² Yet I fear that the

⁴⁷ Significantly, in ordinary speech we use the expression "free state" to denote a state in which human rights are respected, and not one in which the government has discretion vis-à-vis the external world.

⁴⁸ See generally G. CARRIO, *SOBRE LOS LÍMITES DEL LENGUAJE NORMATIVO* (1973).

⁴⁹ Richards, *Rights and Autonomy*, 92 ETHICS 1, 6 (1981). See also Benn, *Freedom, Autonomy and the Concept of a Person*, 66 ARISTOTELIAN SOC'Y PROC. 109 (1976).

⁵⁰ See C. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 76 (1979).

⁵¹ See, e.g., Shue, Book Review, 92 ETHICS 710, 716 (1982).

⁵² A striking example of this confusion of government with people is the Court's discussion of the meaning of the Sandinistas' pledge to democracy. The Court read the junta's clarification that "it was the Nicaraguans themselves who were to decide upon . . . the country's domestic policy" as *weakening* the Sandinista pledge to democracy, the implication being that the whole matter fell under Nicaraguan domestic jurisdiction. See text accompanying note 38 *supra*. But that is precisely the content of the undertaking that the U.S. Congress considered the junta to have violated: that the Nicaraguans themselves must decide upon their domestic policies, that is, that the Government must hold free elections! The junta's declaration quoted by the Court thus *reinforces* rather than weakens the pledge to democracy and free elections. Denying free elections amounts precisely to denying to Nicaraguans their right to control their domestic policies. The Court would have been right if the junta had reserved to *itself*, to the Government, and not to the *Nicaraguans*, the right to decide upon the country's domestic policies.

Court did no more than reflect the moral impotence of international law, as conventionally understood. If so, it is time to abandon the Hegelian Myth and start rethinking the law of nations in a fundamentally different way. International law must be wed to notions of political legitimacy associated with consent, individual rights and human dignity.

The Court's willingness to reach the broad issue of domestic jurisdiction and human rights, when this was hardly necessary in this case, is unprecedented as a judicial technique and wrong on the merits. As a matter of morality, anyone committed to human rights must regard the Court's endorsement of the "right" of dictators to appoint themselves as oppressors of their peoples as profoundly disturbing. The Court could and should have dealt with the human rights argument by attempting to establish the facts. Indeed, it could well be that *on these facts* Nicaragua does not represent the type of situation that would justify the use of *force* by the United States for human rights purposes.⁵³ Yet by this unnecessary, overblown and antiquated worship of the principles of state sovereignty and domestic jurisdiction, the Court has missed a unique opportunity to develop the law in the direction of human dignity. The Court did not need to endorse obsolete conceptions of international law to reach a morally and legally tolerable result in this case. Regrettably, the Judgment has dealt a blow to the much needed strengthening of human rights in the Americas.

The simple moral truth that individuals matter more than rulers has been reaffirmed in the post-Second World War era, during which the development of the law of human rights marked a dramatic departure from the veneration of the nation-state that characterized pre-1945 modern history. In this stage of the moral development of mankind, no World Court ruling can take that away from us.

FERNANDO R. TESÓN*

⁵³ According to the most reliable and impartial reports available, the human rights violations by the Government of Nicaragua are a matter of serious concern. See AMNESTY INTERNATIONAL, NICARAGUA: THE HUMAN RIGHTS RECORD (1986); see also DEP'T OF STATE, BROKEN PROMISES: SANDINISTA REPRESSION OF HUMAN RIGHTS IN NICARAGUA (1984). Yet the deprivations, while serious, do not seem to have reached egregious proportions. More difficult is whether the rebels, or at least a part of them, can be described as pro-human rights forces. Cf., e.g., AMNESTY INTERNATIONAL, *supra*, at 32-36 (reporting human rights abuses by opposition forces) with Separate Opinion of Judge Ago, 1986 ICJ REP. at 186-87, para. 13 (the rebellion originated in a true disagreement of democratic forces with Sandinistas).

* Associate Professor, Arizona State University College of Law. This essay is condensed from my forthcoming book HUMANITARIAN INTERVENTION: AN INQUIRY ON LAW AND MORALITY (Transnational Publishers 1987). I am grateful to Arizona State University College of Law for financial support for the larger project, and to my colleagues Dennis Karjala and David Kader for their critical comments on an earlier draft of this paper.

NOTES AND COMMENTS
CORRESPONDENCE BETWEEN SIR ROBERT JENNINGS
AND KEITH HIGHET

Editor's Note: Judge Jennings and Mr. Highet have agreed to share this private letter from the former to the latter sent in response to notification of his honorary membership in the Society. We thought it would be of some interest to the general membership and to historians.

Dear Keith,

I am writing to thank you most warmly for your kind letter of April 19th about my honorary membership of the A.S.I.L.

May I also say again how very much I appreciate this honour? You may be interested to know how it was that I have been a member for so long. When, after returning from six years in the Army during W.W.II, I returned to Cambridge, I quickly came under the influence of Hersch Lauterpacht, who became one of the closest friends I have ever had. One of his earliest pieces of advice was: "You cannot pretend to be a serious scholar of international law, unless you subscribe to the *American Journal*; so take my advice and do that straight away."

I did!

With renewed thanks, and best personal regards,

Yours sincerely,

ROBBIE

A NOTE TO OUR READERS

Because of space constraints in the *Journal*, a response by John Norton Moore to Rowles, "*Secret Wars*," *Self-Defense and the Charter—A Reply to Professor Moore* (80 AJIL 568 (1986)), is being published in the March/April 1987 issue of the *Virginia Journal of International Law* (vol. 27, No. 2).

CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters should be published and to edit any letters printed. Letters should conform to the same format requirements as other manuscripts.

TO THE EDITOR IN CHIEF:

September 3, 1986

Professor Glennon's brief Editorial Comment, *Mr. Sofaer's War Powers "Partnership"* (80 AJIL 584 (1986)), appears hurried, heated, tendentious, and a bit naive.

Glennon charges that Legal Adviser Sofaer "ignores the authority of Congress to define its own intent" (*id.* at 585). The fallacy of that charge is elementary: the 99th Congress has no power to define the intent of the 100th Congress, and no power to decree that an enactment of the 100th Congress (which the 99th might never have adopted) be construed not to alter the intent of the 99th. It would, indeed, be an abdication of duty for anyone charged with interpreting, applying, or executing the laws to fail to discern, as best he could, the intention of the latest legislation and then carry that out. (*See, e.g., Johnson v. United States*, 163 Fed. 30, 32 (1st Cir. 1908).)

Can the 99th Congress (or could the 84th or 93d) authoritatively lay down that future acts of a future Congress shall not control over the will of *this* Congress, except on conditions imposed by this Congress? If, as seems to be the case, Professor Glennon would say yes, then it is he and not Judge Sofaer who mistakes the ambit of legislative authority.

MALCOLM T. DUNGAN

Professor Glennon replies:

If Congress lacked power to prescribe its own rule of interpretation to specified statutes and thereby to preclude the application of a court-made canon of construction such as the last-in-time doctrine, or if the courts had power to apply such a canon notwithstanding an express statutory prohibition, the writer would be correct in believing a canon of construction to be the juridical equivalent of a constitutional doctrine. It doesn't, they don't, he's not.

TO THE EDITOR IN CHIEF:

July 29, 1986

In *The Secret War in Central America and the Future of World Order* (80 AJIL 43 (1986)), Professor John Norton Moore seeks to provide the academic and legal basis for the Reagan administration's policies in Central America. In doing so, he unequivocally accepts the United States Government's description of events and rejects the views of those who suggest there is a reality other than that presented by the Reagan administration. Admittedly, there is a tremendous amount of misinformation concerning the situation in Central America, including that relating to the level of human rights abuses in the various countries. However, those interested in investigating the subject credibly must be prepared to review critically human rights reports prepared by various entities, including the United States Government, and to consider whether the methodologies employed therein were credible.

In this regard, Professor Moore questions the fact-finding methodology employed by a mission sponsored by the International Human Rights Law Group and the Washington Office on Latin America to investigate abuses by contra forces in Nicaragua (*id.* at 123 n.333). The basis for his complaint is the use by the mission members of a car and driver provided by the Sandinistas and their procedures for selecting persons to be interviewed. The team, however, explains the reasons for its use of the former in its report (Fox and Glennon report, p. 9). Professor Moore neglects to mention that the car was unmarked and that the driver did not accompany the team members once they reached a particular city where interviews were to be conducted.

Further and more important, Professor Moore seeks to undermine the contributions human rights fact-finding missions have made throughout the world by suggesting that interviews conducted by experienced attorneys would not uncover the truth regarding questions of human rights abuses. Investigations, such as the one conducted by Messrs. Fox and Glennon, have sought to document human rights violations by reliance on first-person testimonies, which are subjected to critical cross-examination. Moreover, those concerned with human rights abuses believe that any abuse should be reported; thus, questions of "statistical significance" are not the only point.

Despite his criticism of the methodology employed by some human rights fact-finding missions, Professor Moore does not hesitate to rely on the first-hand observations he made as an election observer in El Salvador as part of an official United States delegation. For those unfamiliar with the phenomenon, let me describe the "methodology" employed by Professor Moore and his colleagues.

In concluding that the Salvadoran elections were amongst the fairest in that country's history, Professor Moore spent less than 48 hours in the country. He was transported to polling sites by U.S. military helicopters and spoke with voters through interpreters, certainly not ways designed to encourage trust in the eyes of those being interviewed.

Further, despite the fact that human rights abuses continue in El Salvador at unacceptable levels, Professor Moore is satisfied that President Duarte is committed to "democratic pluralism, human rights and social justice." How does Professor Moore know this? Because of the vigorous questioning conducted by the United States observer delegation of Duarte and his responses to their questions. What did Professor Moore expect Duarte to say?

The type of fact-finding mission conducted by Professor Moore and his colleagues can only give such missions a bad name. Serious human rights groups, on the other hand, constantly review their methodology to ensure that their findings and conclusions are credible. Alas, one wishes the same could be said of the Department of State and the other groups which Professor Moore so uncritically relies on.

LARRY GARBER
Acting Director
International Human Rights Law Group

Professor Moore replies:

One of the encouraging features of the contemporary international legal system is the proliferation of independent human rights organizations dedicated to making human rights a living reality. Such organizations should be encouraged in carrying out their mission of hard-hitting and objective reporting on human rights violations. That mission, however, can only be harmed by circling the wagons against criticism rather than seeking to improve standards of investigation and reporting. In this respect, the letter from Larry Garber, reacting to restrained criticism of the Donald Fox-Michael Glennon investigation of contra abuses, is disappointing. The methodology of that investigation is flawed and a facile comparison with the United States election observation mission, if indeed relevant, should only heighten an understanding of the investigation's defects. I am disappointed,

but amused, at the suggestion that I seek "to undermine the contributions human rights fact-finding missions have made throughout the world" by applying the very criteria Mr. Garber endorses in his first paragraph ("those interested in investigating the subject credibly must be prepared to review critically human rights reports . . . and to consider whether the methodologies employed therein were credible"). When the acting director of a well-known human rights organization can contradict himself within three paragraphs, I would think that scrutiny would indeed be welcome.

Before I proceed to a brief analysis of the shortcomings of the Fox-Glennon effort and a comparison with the U.S. election observation mission, it may be helpful to set out some of the relevant context for human rights reporting in Central America and to set the record straight as to what I have said, as opposed to Larry Garber's characterizations.

Human rights abuses seem to have occurred on all sides in the Central American conflict. Although, on the basis of the evidence cited in my *Journal* article on Central America, I believe that the Sandinista abuses are particularly systemic and wide ranging, that would not excuse human rights violations by any party. Contrary to the assertion by Garber that my conclusions critical of the Sandinistas are based solely on the U.S. Government's description of events, my *Journal* article cites and relies on all of the major human rights reports on Central America, including those by Americas Watch, Amnesty International, the Inter-American Commission on Human Rights, the nongovernmental Nicaraguan Permanent Commission on Human Rights and numerous press and scholarly reports.¹ In my judgment, the available evidence suggests a pattern of severe and continuing human rights abuse by the Sandinistas, including attacks against opponents, denial of press freedom, suppression of dissent, suppression of organized labor, harassment of religious activities, atrocities against native Indian populations, anti-Semitism, politicization of the judiciary and a general suspension of civil liberties.² No data are offered in the Garber letter that any of these abuses, documented in my article, have in fact not occurred. With respect to alleged contra abuses, Garber fails to note that my article specifically says, "There also have been persistent reports of contra attacks in violation of Article 3, and it seems likely that some have taken place. All such violations should be condemned."³

Human rights reporting in Central America, particularly on alleged contra abuses, has been made particularly difficult by an apparent Sandinista policy to provide misinformation on human rights issues as a deliberate form of political warfare and to seek to use foreign-based groups to spread misinformation. These tactics have been described by numerous observers, including Mateo Guerrero, the former executive director of Nicaragua's National Commission for the Preservation and Protection of Human Rights.⁴

¹ See Moore, *The Secret War in Central America and the Future of World Order*, 80 AJIL 43, 117-25, particularly reports cited at 117 n.293 (1986).

² *Id.* at 117-25. See also the more detailed human rights discussion in my forthcoming book, J. MOORE, *THE SECRET WAR IN CENTRAL AMERICA* (1987).

³ Moore, *supra* note 1, at 123 (footnote omitted).

⁴ Gedda, *Nicaraguan Defects: Human Rights Official Given Asylum in U.S.*, Wash. Post, Aug. 21, 1985, at A13, cols. 1-3. For a summary of information supplied by Guerrero, see DEP'T OF STATE, *INSIDE THE SANDINISTA REGIME: REVELATIONS BY THE EXECUTIVE DIRECTOR OF THE GOVERNMENT'S HUMAN RIGHTS COMMISSION* (1985).

According to Guerrero, the Secretary-General of the Foreign Ministry and the official responsible for monitoring the Nicaraguan National Commission for the Promotion and Protection of Human Rights (CNPPDH), Alejandro Bendana,

stated that acting on the authority of President Daniel Ortega and Foreign Minister Miguel D'Escoto, he would personally direct the CNPPDH for the purpose of promoting a [*sic*] international offensive by the Nicaraguan government denouncing abuses allegedly committed by anti-Sandinista forces. He noted that the CNPPDH would help establish a network of foreign human rights organizations to publicize these abuses throughout the world.⁵

Of particular relevance, Alvaro Baldizón, former chief investigator of the Special Investigation Commission of the Nicaraguan Ministry of the Interior, has reported:

As part of its international political strategy, the Sandinista government seeks to use foreign visitors and religious groups as instruments of support for its public posture that the FSLN and the Nicaraguan Government respect religion and human rights. Baldizon said that the GON [Government of Nicaragua] carefully orchestrates such visits whenever possible in order to obtain the greatest propaganda value

Borge [the GON Minister of the Interior] sends teams of people to be on the routes used and in the localities to be visited. These are called "casual encounter" teams and when a delegation arrives at a location, MINT [Ministry of the Interior] personnel, pretending to be local residents, "just happen" to be available to talk with the delegation's members. They describe alleged contra atrocities and the benefits of the Sandinista revolution for Nicaragua's peasants and workers.⁶

Baldizón has also described covert special operations teams sent by the Nicaraguan Government to front areas to impersonate contras. In a statement of February 27, 1986, Baldizón said:

Towards the end of 1981, the first of three platoons of Nicaraguan commandos in the Special Operations Forces returned from training in East Germany. Their first mission was to search out and annihilate bands of counter-revolutionaries operating in the countryside surrounding Matagalpa and Jinotega. The platoon was placed under the command of Captain Marcos Arevalo (alias Marcon), and the soldiers were disguised as counter-revolutionary guerrillas. They were given old clothes and miscellaneous M-16 and Galil weapons.

They went into the bush, and began operations as if they were part of the resistance. They killed about a dozen campesinos who were known Sandinista collaborators. They burned their houses and even set fire to a government cooperative. . . . At the end of the operation, Captain Arevalo was promoted to sub-comandante, and all of his soldiers were rewarded with commissions as second lieutenants.

⁵ DEP'T OF STATE, *supra* note 4, at 3.

⁶ DEP'T OF STATE, INSIDE THE SANDINISTA REGIME: A SPECIAL INVESTIGATOR'S PERSPECTIVE 11 (1986).

By the end of 1982, two more platoons returned from commando training in East Germany and were sent to the field in March of 1983. Meanwhile, the Special Operations Forces had been buying jungle boots and uniforms identical to those used by the organized resistance movements. These two platoons were dressed up as contras and given weapons like M-60 machine guns and FAL, G-3, M-16 and Chinese Ak-47 automatic rifles. They sent one of the units, under the command of Captain Paniagua, to work in Matagalpa, Jinotega and Nueva Segovia departments. The other, led by Captain Octavio Huete, went to Boaco and Chontales departments. . . . These platoons continued to operate until the end of 1984.

Near a place called El Corozo in Boaco, Captain Huete's group posed as FDN combatants and moved in to threaten and agitate local peasants. They continued until an actual ARDE task force, led by Comandante Cyclone, approached. . . .

During December 1984 and January 1985, I was asked to investigate another failure of one of the Special Operations platoons on a mission near San Juan de Rio Coco. I questioned three captains and some 30 soldiers who discussed the atrocities they had broadly committed in the course of their association with their units.

Apart from these activities, a new unit was inaugurated in October 1984, whose mission was distinctly more oriented toward international propaganda. Selected officers from Special Operations were placed in a squad under the command of Captain Morales. An ex-member of the FDN, Alfredo Lazo Valdivia was assigned as a guide. They began operations near the Honduran border in Chinandega, Madriz, Nueva Segovia, and Jinotega. They also made selective incursions into Honduras. They still operate in that area, and their mission is to pose as FDN combatants, ambush civilian vehicles, as well as threaten and beat up local peasants, especially those known to have collaborated with the government. They are one of Interior Minister Borge's greatest treasures.⁷

Similarly, Douglas Payne has documented how the FMLN "incorporates broadfront deception in its strategic line, with a special emphasis on human rights." Of particular interest, he notes:

One document describes the existence of an internal human rights front whose task is to promote among outside observers specific human rights issues that would enhance the FMLN's military capability. For instance, it was stressed that the issue of civilian deaths during Salvadoran Air Force bombing was paramount for promotion because the bombing was the most effective tactic against the FMLN military operation and had to be defused.⁸

⁷ Dep't of State, Sandinistas Disguised as Contras (Statement by Alvaro Baldizón, Feb. 27, 1986).

These widely reported statements by former Sandinista officials have not been independently cross-checked by the author, who does not purport to have made a field investigation of human rights abuses in Nicaragua.

⁸ D. Payne, Human Rights in Nicaragua 6-7 (paper presented to a conference jointly sponsored by the American Bar Association and the Saint Louis University School of Law, Feb. 1, 1986). Payne also tells how a Nicaraguan Jesuit priest, Fernando Cardenal, concealed from an American congressional committee in 1977 that he "was a full member of the Sandinista Front." *Id.* at 3.

The Central American human rights reporting landscape also includes a partially successful effort by the Sandinistas secretly to influence a major Senate hearing on contra human rights issues.⁹ More generally, Professor Paul Hollander has described the difficulties of what he terms "political pilgrims" in accurately reporting events in totalitarian countries,¹⁰ and in several recent articles he has detailed this problem for those traveling in Sandinista Nicaragua.¹¹ This general context in which human rights investigations must necessarily proceed in Nicaragua does not suggest that human rights reporting that may coincidentally be supportive of the objectives of such regimes should not be undertaken, but only that when undertaken, it should be pursued with particular care to ensure that it not be compromised.

* * * *

With this general background, let me turn to my specific criticisms of the methodology of the Fox-Glennon report. It might first be noted, however, that because of my respect for the motivations of those undertaking this report, my *Journal* criticism was deliberately muted; it consisted of a footnote saying: "Although the authors are clearly sincere, their use of a Sandinista governmental car and driver, and the procedures employed, e.g., in selecting and interviewing persons and reporting the results, significantly flawed the report."¹² Larry Garber's exception to this mild criticism compels me to offer a fuller exposition of the flaws in the investigation and report. In doing so, let me reiterate my support for objective, hard-hitting human rights investigation and my respect for those who carry out such investigations under difficult conditions.

First, while Fox and Glennon are both able lawyers, the delegation was overly narrow. An important human rights investigation, undertaken against a background of Nicaraguan governmental misinformation, should have been conducted by a broad cross-section of investigators, including distinguished individuals with a variety of perspectives and backgrounds. The report, however, does not indicate that any effort was made to include additional perspectives or a larger number of experts. In contrast, the United States observer mission to the elections in El Salvador had a broad cross-section of national leaders, including a number of congressmen and senators; and leading congressional opponents of U.S. policy, such as Senators Dodd and Tsongas, were invited to participate. It was led by Ambassador Max Kampelman, the experienced U.S. head of delegation to the Conference on Security and Cooperation in Europe and currently the U.S. head of delegation to the Geneva arms control talks with the Soviet Union. While I am completely convinced that Donald Fox is motivated solely by human rights concerns—there is at least an *appearance* of conflict of interest when his wife is a relative of a Nicaraguan official. This appearance of conflict is heightened when not disclosed in the report. Anyone with such an apparent conflict, no matter how able, is not the appropriate choice for a two-person investigating team in such a sensitive area. The lack of breadth in the team's report

⁹ See Muravchik, *Manipulating the Miskitos*, NEW REPUBLIC, Aug. 6, 1984, at 21-25.

¹⁰ P. HOLLANDER, *POLITICAL PILGRIMS* (1981).

¹¹ See, e.g., Hollander, *The Newest Political Pilgrims*, COMMENTARY, August 1985, at 37, 37, 38, 40 and 41.

¹² Moore, *supra* note 1, at 123 n.333.

is exacerbated by the fact that one of the sponsoring organizations of the investigation was the Washington Office on Latin America, well known for its opposition to U.S. policy in Central America.

Second, the investigation vigorously asserted its complete independence, yet seems to have been intertwined with the Government of Nicaragua—and particularly with counsel for Nicaragua in the World Court case against the United States—in a number of subtle, but potentially distortive, ways:

- According to Paul Reichler, an attorney representing Nicaragua before the World Court and a registered agent of the Government of Nicaragua, “the suggestion for an independent and objective study of contra abuses against civilians came initially from my law firm.”¹³

- The mandate for the investigation by Fox and Glennon included as a core direction that it evaluate the previous “Brody report,” prepared at the initiation of Reichler’s office but compromised by substantial involvement of the Nicaraguan Government. Indeed, the Fox-Glennon report was released at a press conference with the Brody report, which Fox and Glennon asserted was substantiated by their investigation. Larry Garber’s introduction to the Fox-Glennon report is particularly revealing in characterizing the assistance provided by the Nicaraguan Government to the preparation of the Brody report as “minor.”¹⁴ This “minor” assistance is described by the former executive director of the Nicaragua Human Rights Commission as including a headquarters in Managua, lodging, financing and assistance in arranging interviews believed to “have most impact on the lawyers and the public.”¹⁵ The interrelation with the Brody report in effect meant that the Fox-Glennon investigation was significantly channeled toward evaluating a report produced with substantial Sandinista involvement.

- There seems to have been considerable interaction between the investigation and the office of Paul Reichler representing Nicaragua before the World Court. This has been said to include conversations between Reichler’s office and the sponsoring organizations, and Reichler’s meeting the members of the delegation at the airport in Managua, expediting them through customs, driving them to their hotel and subsequently, as part of the same trip, arranging a meeting for one of the delegation principals with government officials involved with Reichler in the case against the United States before the World Court.¹⁶ The delegation member apparently attending that meeting later testified for Nicaragua before the World Court. The delegation members also used a car and driver provided by the Sandinistas, although they—and Larry Garber—have made much of the points that the car was unmarked and that the driver did not attend interviews. There have

¹³ See *Facts Don't Support Attack on Professor*, Cincinnati Enquirer, Dec. 22, 1985, at F3, col. 1.

¹⁴ See D. FOX & M. GLENNON, REPORT TO THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AND THE WASHINGTON OFFICE ON LATIN AMERICA CONCERNING ABUSES AGAINST CIVILIANS BY COUNTERREVOLUTIONARIES OPERATING IN NICARAGUA, at iv and 2 (1985) (Garber, and Fox & Glennon, respectively).

¹⁵ See Moore, *supra* note 1, at 124 n.338.

¹⁶ The other principal may not even have been aware of this meeting.

also been reports that media coverage on the release of the Fox-Glennon report was arranged by a public relations firm, Fenton Communications, which previously served as a registered agent for the Government of Nicaragua (and for Grenada under Maurice Bishop). None of these interactions with the Government of Nicaragua and those intertwined with it were revealed in the Fox-Glennon report except the use of a Sandinista car and driver.¹⁷

Third, the procedures for the selection of persons interviewed about contra abuses do not fill one with confidence in view of the reported tactic of the Sandinistas to field "casual encounter" teams for foreign visitors and the existence of Sandinista-controlled *Sandinista Defense Committees* (SDCs) at the local level throughout Nicaragua. Apparently, 10 of the "over 36" witnesses were selected from Brody report affidavits already tainted by heavy involvement of the Nicaraguan Government. And unknown numbers of others, according to the Fox-Glennon report, "came to see us because they heard we were there." Although the authors say they did not reveal their itinerary, they do not indicate how it was selected and seem insensitive to the fact that their government driver could certainly know their whereabouts.

Fourth, the procedures used to conduct the "investigation" were rudimentary at best. The investigators apparently spent no more than 4 days interviewing in the field, and while they say they sought to cross-check where possible, their report does not reveal what percentage of interviews relied on were cross-checked, what percentage of incidents discussed were corroborated through cross-checks, or what techniques were used to verify that those perpetrating incidents were in fact contras. A recent report by investigators at Berkeley who examined North Vietnamese human rights violations provides an instructive contrast in the specificity with which cross-check methodology is developed and discussed.¹⁸ In place of careful investigation techniques, the authors of the report, and Larry Garber in his letter, rely heavily on an almost mystical assertion of a lawyer's alleged ability to find the facts through cross-examination. But, as any experienced lawyer knows, cross-examination is largely a technique used by an adverse party for impeaching a witness's testimony when contrary facts are known through previous investigation. How witnesses were to be reliably tested by nonadverse interviewers who had not conducted a full investigation of the alleged incidents remains a mystery. Moreover, almost none of the questions asked interviewees in this assertedly tough cross-examination are reproduced in the Fox-Glennon report. Similarly, the investigators apparently felt that they had adequately verified the controversial Brody report by interviewing 10 of some 146 persons interviewed by Brody. Again, the investigators seem

¹⁷ It has been urged that this series of contacts with the Nicaraguan Government was simply part of a broad series of inquiries made for the investigation. There is substantial question, however, whether the indicated degree of contact with the Nicaraguan Government is appropriate for an investigation that must, of necessity, operate in the shadow of Sandinista political interest.

Of equal concern, there is a serious question whether the appropriate contact of the Nicaraguan Government for the investigation was a principal attorney coordinating Nicaragua's pending case before the World Court. This concern is heightened by the admitted involvement of that attorney in promoting the investigation and the subsequent appearance of one of the delegation principals on behalf of Nicaragua before the Court.

¹⁸ Desbarats & Jackson, *Vietnam 1975-1982: The Cruel Peace*, WASH. Q., Fall 1985, at 169.

unaware that the issue is less one of the existence of persons making statements than the accuracy of those statements and the existence of corroborative evidence of the underlying incidents, including the identity of the perpetrators. The crux of an investigation of human rights abuse in an area of high political controversy surely must be a careful cross-checking of incidents through multiple sources, rather than interviewing and counting of affidavits.

Fifth, the reporting of the data is poor. As previously mentioned, it does not reveal all the questions asked by the interrogators or anything about the number of affidavits or incidents verified through cross-checks or how any such cross-checks were conducted. Eleven out of 25 of the attached affidavits conclude with a statement roughly to the effect that the interviewee is a good Catholic and not a Communist. Since this is a rather startling coincidence, not only in content but also in location—and one coinciding with an obvious Sandinista public affairs theme—it suggests either an effort to manipulate the authors or a pattern of questioning by them that resembles leading questions more than rigorous cross-examination. Since at least one of the authors of the report in a conversation with me expressed doubts about the questioning of the other (a difference itself suggesting little advance thought or institutional input in critical methodology to the investigation), and since the report itself refers to the team's getting as a response to a question that the witness was Catholic, I will assume that the latter was true. Neither conclusion lends much confidence to the investigative process. Similarly, the report does not fully present to the reader any contrary views heard by the delegation. While the report in passing reveals that some interviewees were inclined to dismiss reports of contra atrocities, no affidavits from any such persons are included except for El Muerto, a contra leader interviewed in Tipitapa at the Modelo Prison who denied contra participation in abuses and whose statement is apparently disregarded by the authors. Although the affidavit of the Nicaraguan Deputy Minister of the Interior, Luis Carrión (accused by Baldizón of authorizing "special operations" to kill dissidents¹⁹), is included, no affidavit is supplied from Cardinal Obando y Bravo, a leading critic of the Sandinistas with whom the delegation met. Even more significantly, the report only includes 25 affidavits out of "more than 36" interviews. Why some were omitted, and why no full transcripts of the interviews seem to have been made available, is not apparent. The report also does not reveal why no affidavits were included from the field investigations in Esteli and which of the included affidavits were from interviewees of the Brody investigation. A puzzling technical matter is that not all the dates on the affidavits coincide with the reported itinerary.

This critique of their report does not—and does not purport to—establish the truth or falsity of the substance reported by Fox and Glennon. Nor does it impugn—or seek to impugn—the good faith of the investigators or the organizations they represent in seeking to further human rights. Nor does it deny the possibility that the report may have increased pressure on one combatant in a difficult conflict to tighten human rights standards. It *does* suggest naiveté in an admittedly difficult investigation and procedures that are sloppy at best. It is important to remember that in the end, good faith is not sufficient. Truth, as ascertained through careful investigation, is of particular importance in a politically sensitive ongoing war. Certainly in the

¹⁹ See Information Supplied by Alvaro Baldizon Aviles 1, 7, and 9 (unpublished paper on file at the Center for Law and National Security, University of Virginia School of Law, 1985).

Central American context, pressure on all sides to tighten human rights standards is useful.

Additional comparisons with the official U.S. observer mission to the Salvadoran presidential election further demonstrate the shortcomings of the Fox-Glennon report. Since an election observation mission is primarily to monitor the voting, it is not inappropriate for it to remain in the country only for that event and rely on secondary sources for characterization of preelection events. In contrast, there is no apparent reason for a serious investigation of contra human rights abuses that relies exclusively on events not observed by the delegation to confine itself to 4 days of field investigation. Moreover, the U.S. special mission to observe the presidential election in El Salvador did not rely on the Salvadoran Government; rather, it exclusively used transportation and facilities supplied by the United States Government, and arrangements were made through the United States Embassy. It should also be pointed out that the U.S. mission included an internationally known expert on the election process and did not purport to be anything other than an official United States government delegation. Contrary to the suggestion that my *Journal* article relies on questioning of Duarte to reveal his human rights record, the reference to the interview with Duarte appears in a footnote and is clearly cited only for the unexceptional proposition that the *United States delegation* was "impressed with the depth of Duarte's commitment" on human rights. Incidentally, Garber's account of the U.S. observation mission is factually inaccurate in numerous respects, but those inaccuracies, like his use of this very different mission as a comparison, are largely irrelevant. Even if the mission was not perfectly conceived, that would no more justify structural defects in an important human rights investigation than the argument that Sandinista human rights abuses justify contra abuses. That is, this argument of Garber, as all such arguments, is a paradigm of the logical fallacy known as a *non sequitur*.²⁰

The Fox-Glennon report cites as a reason the authors did not prepare a report on Sandinista abuses that their "sponsors also have monitored human rights developments in Nicaragua since the 1979 revolution."²¹ As far as I can ascertain, this "monitoring" by Larry Garber's International Human Rights Law Group has resulted in only two reports. One is cautiously critical of the Sandinistas for press censorship,²² while the other proclaims that the Sandinista elections were genuine.²³ That is the same election in which mobs organized by the Government stoned Arturo Cruz, the principal non-Sandinista candidate.²⁴ It should be recalled that the *New York Times* editorialized about the same elections that "only the naive believe" they were democratic and legitimating.²⁵

Most importantly for the future, if independent human rights organizations are effectively to implement their mandate for promoting human rights,

²⁰ See, e.g., S. BARKER, *THE ELEMENTS OF LOGIC* (1965).

²¹ D. FOX & M. GLENNON, *supra* note 14, at 8 n.14.

²² See INTERNATIONAL HUMAN RIGHTS LAW GROUP, *GOVERNMENT RESTRICTIONS ON THE PRESS IN NICARAGUA: THE STATE OF EMERGENCY AND INTERNATIONAL LAW* (1983).

²³ See INTERNATIONAL HUMAN RIGHTS LAW GROUP & WASHINGTON OFFICE ON LATIN AMERICA, *A POLITICAL OPENING IN NICARAGUA: REPORT ON THE NICARAGUAN ELECTIONS OF NOVEMBER 4, 1984* (1984). (Like the Fox-Glennon report, this election report was cosponsored with the Washington Office on Latin America.)

²⁴ See J. MOORE, *supra* note 2, at 18 (in manuscript).

²⁵ See *id.* at 75.

they must toughen their standards of independence, evenhandedness, investigation and reporting. The Fox-Glennon report is a flawed report, but in that respect it may not be much different from many current efforts in the difficult Central American setting, including, in this author's judgment, some of the Americas Watch reports.²⁶ It is hoped that rather than seeking to stifle criticism, human rights organizations working on Central America will begin to police one another and to raise the level of independent human rights reporting generally. It is precisely because the stakes for human rights and world order are so high that we must accept no less.

Editor's note: A response by Professor Glennon will appear in the April 1987 issue.

TO THE EDITOR IN CHIEF:

December 4, 1986

Professor Thomas Franck's Editorial Comment (In re *Herbert Reis*) in the October 1986 issue of the *Journal* attacks the decision by the U.S. Government to nominate an individual, unnamed by Professor Franck, whom he deems a "hapless successor" to Herbert Reis, the outgoing U.S. national on the United Nations Administrative Tribunal. The nomination is characterized by Professor Franck as "ward-level partisan politics" and the product of "narrowly defined partisan interest"; the decision not to reappoint Mr. Reis is described as a "baleful incident," reminiscent of the McCarthyism which prevented Professor Philip Jessup's appointment in 1955 to the International Law Commission.

This is rather strong and unusual language for a *Journal* Editorial Comment. To be sure, as Editor in Chief and a member of the *Journal's* Editorial Board, Professor Franck is free to write and publish editorial comments as he pleases. But unless the same standards of scholarship and scrupulous fairness demanded of other contributions to the *Journal* are adhered to, the *Journal* and all concerned are disserved. Surprisingly, Professor Franck's Editorial Comment departs from the high standards of his other writings. He apparently either did not look carefully into, or ignored the qualifications of Mr. Reis's successor, Jerome Ackerman of the Washington, D.C. Bar.

Permit me to set the record straight. In early 1986, I was asked by the U.S. Mission to the United Nations, where I continued to serve as Adviser to Ambassador Vernon Walters, to assist in the search for a highly qualified candidate as a possible alternative to Mr. Reis. I knew Mr. Ackerman as a brilliant attorney and advocate with a national reputation as a litigator in labor law-related matters, and with considerable arbitration experience. A graduate of the Cornell University School of Industrial and Labor Relations, he received his law degree, magna cum laude, at the Harvard Law School and specialized in employment relations law for 35 years at the Washington law firm of Covington & Burling, from which he was scheduled to retire from active practice in late 1986. In addition to his experience, his reputation for competence, good judgment, integrity and fairness persuaded me, after reviewing the qualifications of several other distinguished individuals, that he would be an ideal candidate for the UN Administrative Tribunal.

Professor Franck suggests that little prior experience in public international law is a disqualifying factor for membership on the Tribunal. But this

²⁶ For a critique of the Americas Watch reports, see Moore, *supra* note 1, at 51 n.28.

is off the mark. The UN Administrative Tribunal is concerned primarily, if not exclusively, with employment relations issues of various types. By its statute the Tribunal is empowered only to "hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or the terms of appointment of such staff members." Whatever questions of public international law that may arise in this context are unlikely to be beyond Mr. Ackerman's abilities.

The very high regard for the UN Administrative Tribunal held by the United States led it to designate an individual meeting the highest standards of professional competence and personal integrity. Professor Franck's prophecy that by this appointment "the administration's base of support in the international legal profession, already eroded by various law-defying policies, will needlessly suffer further attrition" is simply conjecture based on mistaken assumptions. In saying this, I do not differ with the point twice made by Professor Franck in the *Journal* that Mr. Reis has served ably on the Administrative Tribunal. He brought to the Tribunal his useful perspectives as a career State Department lawyer and surely merited the honor of being designated by his peers as one of the two Vice-Presidents of the Tribunal. Mr. Ackerman will doubtless bring fresh perspectives from a different, but no less valuable, background. There is every reason to believe that his tenure on the UN Administrative Tribunal will reflect equally, and perhaps even more, to the credit of the UN Administrative Tribunal and the United States.

ALLAN GERSON*

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CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

JUDICIAL ASSISTANCE

(U.S. *Digest*, Ch. 6, §6)

Inter-American Convention on Letters Rogatory, with Additional Protocol

On October 9, 1986, the Senate, by a vote of 98 to 0, with 2 abstentions, voted its advice and consent to ratification of the Inter-American Convention on Letters Rogatory, adopted at Panama City, Panama, on January 30, 1975, together with the Additional Protocol to the Convention, adopted at Montevideo, Uruguay, on May 8, 1979. Both had been signed on behalf of the United States on April 15, 1980, and transmitted to the Senate by President Reagan on June 7, 1984. The resolution of ratification included two technical reservations recommended by the Department of State.¹

The Convention and its Additional Protocol establish a system of judicial assistance among the United States and other contracting states that are members of the Organization of American States, analogous to that among states parties to the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters (the Hague Service Convention).²

When recommending transmittal of the Convention to the Senate for advice and consent to ratification, Acting Secretary of State Kenneth W. Dam had reported to the President under date of June 7, 1984:

* Office of the Legal Adviser, Department of State.

¹ The reservations read as follows:

1. Pursuant to Article 2(b) of the Inter-American Convention on Letters Rogatory, letters rogatory that have as their purpose the taking of evidence shall be excluded from the rights, obligations and operation of this Convention between the United States and another State Party.

2. In ratifying the Inter-American Convention on Letters Rogatory, the United States accepts entry into force and undertakes treaty relations only with respect to States which have ratified or acceded to the Additional Protocol as well as the Inter-American Convention, and not with respect to States which have ratified or acceded to the Inter-American Convention alone.

132 CONG. REC. S15,768 (daily ed. Oct. 9, 1986); see also *id.* at S13,730 (Sept. 25, 1986).

² Done Nov. 15, 1956, 20 UST 361, TIAS No. 6638, 658 UNTS 163.

The Hague Service Convention has eliminated much of the time, effort and expense previously required in executing requests for service of judicial documents among the States which are parties to it. Under the Hague Service Convention, a requesting authority may transmit a request for service directly to the designated Central Authority in the Contracting State in which service is to be effected. The Central Authority addressed is obligated to execute the request in accordance with its domestic law, or with any special procedures requested. Requirements for authentication and translation of documents are minimal and therefore costs of effecting service under the Hague Service Convention are relatively small. Furthermore, the Hague Service Convention prescribes the use of certain standardized forms in sending requests for service abroad, and this has vastly simplified the preparation of requests in the requesting State and their execution in the requested State.

The success of the Hague Service Convention is evidenced by the ever-increasing number of countries which have become parties to it . . . and by the heavy volume of service requests processed. . . .

In January 1975, the OAS convened at Panama City the First Inter-American Specialized Conference on Private International Law (CIDIP-I). Although aside from the United States only one of the OAS members, Barbados, had acceded to the Hague Service Convention, the members recognized the desirability of a multilateral treaty regime to promote the orderly and efficacious service of foreign judicial documents. For this reason the participating OAS members negotiated at CIDIP-I and adopted the Inter-American Convention on Letters Rogatory (hereafter, "the Convention"). . . . The Convention is open for ratification or accession by any State, including States which are not OAS members.

The United States did not originally sign the Convention, among other reasons because it believed that service of judicial documents could be more effectively accomplished if certain additional provisions were incorporated in the treaty regime. The United States, therefore, proposed the draft of a protocol to the Convention for consideration at the Second Inter-American Specialized Conference on Private International Law (CIDIP-II), which met in Montevideo from April 13 to May 8, 1979. The Additional Protocol that was adopted at that Convention was generally based on the United States draft.

Among the most notable provisions of the Additional Protocol are those which clarify the obligation of parties to the Convention to designate a "Central Authority"; simplify the authentication requirement for the documents transmitted by letters rogatory for service; prescribe the use of agreed forms for issuance and execution of requests; and establish a procedure for payment of costs that should ensure prompt service of documents.

The Convention, together with the Additional Protocol, establishes a mechanism for the service of process and similar documents and for

processing certain requests for information which should, like the Hague Service Convention, save American courts and litigants significant time, effort and expense. It should be noted that, under Article 2(b) of the Convention, letters rogatory could also be used for the taking of evidence abroad unless a party to the Convention makes a reservation in this respect. I recommend that the United States make such a reservation. While it will be desirable eventually to have available among OAS member States a treaty mechanism for the taking of evidence abroad, a better vehicle than this Convention is on the horizon.

At the same conference at which the present Convention was adopted, CIDIP-I, the participating OAS member States also adopted the Inter-American Convention on the Taking of Evidence Abroad. The United States has not yet signed that Convention, believing that it should be modified by an additional protocol to make it more closely parallel the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters (T.I.A.S. 7444, 23 U.S.T. 2555), which entered into force for the United States on October 7, 1972. An Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad has now been adopted, agreement having been reached at the Third Inter-American Specialized Conference on Private International Law (CIDIP-III), which met in La Paz, Bolivia, from May 15 to 24, 1984. The United States will be examining the Additional Protocol with the expectation of being able to sign it and the basic Convention in the near future.

In addition, I recommend that the United States further limit its rights and obligations under the Convention with a reservation which would clarify that our treaty obligations extend only to States which have adhered to both the Convention and the Additional Protocol, and not to the Convention alone. This second recommended reservation . . . is permitted by Article 25 of the Convention and reflects the general understanding reached at CIDIP-II. . . .

United States ratification of the Inter-American Convention and Additional Protocol has been recommended by the Secretary of State's Advisory Committee on Private International Law, a Committee comprising representatives of major national legal organizations. In addition, the American Bar Association (ABA), by means of a resolution adopted by its House of Delegates at its meeting of August 11-12, 1981, has expressed support for ratification of the Convention and Additional Protocol, subject to the two reservations described above.

The obligations which the Convention and Additional Protocol would impose on the United States for execution of foreign letters rogatory are consistent with existing United States practice, as authorized by 28 U.S.C. 1696, 1781, and 1782. Thus, no additional implementing legislation will be required.³

³ S. TREATY DOC. NO. 27, 98th Cong., 2d Sess., at iii-v, xii (1984).

INTERNATIONAL ECONOMIC ASSISTANCE AND DEVELOPMENT

(U.S. *Digest*, Ch. 10, §3)*Anglo-Irish Agreement Support Act of 1986*

On September 19, 1986, President Reagan signed into law the Anglo-Irish Agreement Support Act of 1986 (Pub. L. No. 99-415, 100 Stat. 947), whose purpose is to provide for U.S. contributions in support of the Anglo-Irish Agreement, signed by Prime Ministers Margaret Thatcher and Garret FitzGerald on November 15, 1985, at Hillsborough, Northern Ireland. The contributions are "to consist of economic support fund assistance for payment to the International Fund established pursuant to [Article 10 of] the . . . Agreement, as well as other assistance to serve as an incentive for economic development and reconciliation in Ireland and Northern Ireland."

Section 3 of the Act authorizes \$50 million to be used for such contributions to the fund for fiscal year 1986, and for each of fiscal years 1987 and 1988, the amount of \$35 million.

Under section 5, the U.S. contributions may be used only to support and promote economic and social reconstruction and development in Ireland and Northern Ireland. Such contributions are subject to restrictions in Foreign Assistance Act sections 531(e) (22 U.S.C. §2346(e) (prohibition against use of funds for military or paramilitary purposes)) and 660(a) (22 U.S.C. §2420(a) (prohibition against use of funds for foreign government's police, prisons or other law enforcement forces, or for foreign government's internal intelligence or surveillance)). Section 5(b) of the Anglo-Irish Agreement Support Act requires the President to make every effort in consultation with the Governments of the United Kingdom and of Ireland to ensure United States representation on the board of the international fund. Under section 5(c), as a prerequisite to U.S. contributions each fiscal year, the President must certify to the Congress that the board of the fund as a whole is broadly representative of the interests of the communities in Ireland and Northern Ireland, and that disbursements from the fund "(A) will be distributed in accordance with the principle of equality of opportunity and nondiscrimination in employment, without regard to religious affiliation; and (B) will address the needs of both communities in Northern Ireland." Each certification must include a detailed explanation of the basis for the President's decision.

Section 6 requires the President at the end of each fiscal year in which the United States contributes to the fund to report to Congress on the degree to which: (1) the fund has contributed to reconciliation between the communities in Northern Ireland; (2) the U.S. contribution is meeting its objectives of encouraging new investment, job creation and economic reconstruction on the basis of strict equality of opportunity; and (3) the fund has increased respect for the human rights and fundamental freedoms of all people in Northern Ireland.¹

¹ Subsequently, on Sept. 26, 1986, Ambassadors Padraic MacKernan (for Ireland) and Sir Antony Acland (for the United Kingdom of Great Britain and Northern Ireland) and M. Peter

ECONOMIC SANCTIONS

(U.S. *Digest*, Ch. 10, §12)*Comprehensive Anti-Apartheid Act of 1986*

On September 29, 1986, the House of Representatives by a vote of 313 to 83 overrode President Reagan's veto on September 26 of H.R. 4868, the Comprehensive Anti-Apartheid Act of 1986,¹ and on October 2, 1986, the Senate by a vote of 78 to 21 also overrode the presidential veto.

The Act, the stated purpose of which is to "set forth a comprehensive and complete framework to guide the efforts of the United States in helping to bring an end to apartheid in South Africa and lead to the establishment of a nonracial, democratic form of government," applies to the Republic of South Africa, "any territory under the Administration, legal or illegal, of South Africa [i.e., Namibia]," and to the "bantustans" or "homelands," including the Transkei, Bophuthatswana, Ciskei and Venda. It consists of six major titles, or parts: I, Policy of the United States with Respect to Ending Apartheid; II, Measures to Assist Victims of Apartheid; III, Measures by the United States to Undermine Apartheid; IV, Multilateral Measures to Undermine Apartheid; V, Future Policy toward South Africa; and VI, Enforcement and Administrative Provisions.

With the exception of section 312 (policy toward violence or terrorism), the measures set out in title III are of an economic nature. They not only codify into statutory law earlier measures contained in executive orders, but also include additional provisions.

Imports and Exports

Section 301 prohibits any person, including a bank, from importing into the United States any South African Krugerrand or any other gold coin minted in South Africa or offered for sale by the South African Government, continuing—and expanding—the prohibition against the import of Kru-

McPherson, Administrator of the Agency for International Development, signed a tripartite agreement setting out the parties' understanding regarding the fund and its financing by the United States. Article 2 provided that, before establishment of the fund, the Governments of Ireland and of the United Kingdom (the "two Governments"), and after its establishment, the board of the fund would involve the United States (the "Donor") in substantive discussions in order to take into account, inter alia, the concerns and the procedural and programmatic emphases expressed by Congress in authorizing and appropriating the assistance granted. In Article 3 the United States agreed to grant as a contribution to the fund's capital a sum not to exceed \$50 million, with disbursement taking place only after the two Governments had furnished to the Donor evidence, as detailed in Article 4, of the establishment of a trust account with a recognized trustee bank, which would receive and hold the grant pending (completion of) legal establishment of the fund and satisfaction of certain evidentiary requirements regarding its administration and operation, specified in Annex B to the Agreement.

Dept. of State Files L/T:

¹ Pub. L. No. 99-440, 100 Stat. 1086 (1986) (to be codified, as amended by Pub. L. No. 99-631, at 22 U.S.C. §5001 *et seq.*).

gerrands issued by President Reagan under Executive Order No. 12535, dated October 1, 1985.²

Other import prohibitions cover: (1) arms, ammunition or military vehicles produced in South Africa or any manufacturing data therefor (section 302);³ (2) products grown, produced, manufactured by, marketed or otherwise exported by "parastatal" organizations, except for strategic minerals for which the President has certified to Congress that the quantities essential for the U.S. economy or defense are unavailable from reliable and secure suppliers, and except for articles imported under a contract entered into before August 15, 1986 and received by a U.S. national by April 1, 1987 (section 303); (3) after 90 days from enactment of the Act, uranium ore or oxide, coal and textiles (section 309); (4) any agricultural commodity, product, byproduct, or derivative thereof, or article suitable for human consumption, that is a product of South Africa (section 319); (5) iron or steel produced in South Africa (section 320); and (6) any sugars, syrups or molasses that are products of the Republic of South Africa, the aggregate quantity thereof to be added to allocations of such products from the Philippines (section 323).

Section 304 of the Act continues the prohibitions on the export of computers and related goods and services provided for under section 1(b) of Executive Order No. 12532, of September 9, 1985.⁴

Under section 317, no item on the United States Munition List, subject to U.S. jurisdiction, may be exported to South Africa; but the prohibition does not apply to any item that is not covered by UN Security Council Resolution 418 of November 4, 1977, and that is determined by the President as being exported solely for commercial purposes and not for use by South African armed forces, police, or other security forces or for other military use. Section 318 requires the President to notify the Congress of his intent to allow the export of such items and to certify that they are to be used solely for commercial purposes. Congress may disapprove the sale by joint resolution within a 30-calendar-day period of continuous session.

Fuels

Section 321 of the Comprehensive Anti-Apartheid Act prohibits exports to South Africa of crude oil or refined petroleum products either subject to U.S. jurisdiction or exported by a person subject to U.S. jurisdiction.

Section 307, concerning nuclear trade with South Africa, continues on a South Africa-specific statutory basis a prohibition against most nuclear trade and exports to South Africa, which the U.S. Government has prohibited since 1978 under the general prohibition against such exports to states not maintaining International Atomic Energy Agency safeguards with respect

² 50 Fed. Reg. 40,325 (1985). See 80 AJIL 153, 157 (1986). Section 510 of the 1986 Act contains a similar import prohibition as to any gold coin minted in the USSR or offered for sale by the Soviet Government.

³ See also sec. 1(d), Exec. Order No. 12532, 50 Fed. Reg. 36,861 (1985), discussed in 80 AJIL at 155.

⁴ See 80 AJIL at 154.

to *all* peaceful nuclear activities in or under their jurisdiction, or carried out under their control.⁵ The prohibitions under section 307 will apply unless the South African Government becomes a party to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons,⁶ or otherwise maintains IAEA safeguards on all its peaceful nuclear activities, as defined in the Nuclear Non-Proliferation Act of 1978. The prohibition does not preclude any export, retransfer or activity generally licensed or authorized by the Nuclear Regulatory Commission, the Department of Commerce or the Department of Energy, nor does it preclude assistance for developing or applying IAEA safeguards or activities for humanitarian reasons to protect the public health and safety. The prohibitions will not apply to a particular export, retransfer or activity, if the President determines that to apply them would seriously prejudice achievement of U.S. nonproliferation objectives or would otherwise jeopardize the common defense and security of the United States, and at least 60 days prior to the initial export, retransfer or activity, the President so reports to the Speaker of the House and the Chairman of the Senate Committee on Foreign Relations.

Financial Transactions

Under section 305 of the Act, no U.S. national may make or approve any loan or other extension of credit, directly or indirectly, to the South African Government or to any corporation, partnership or other organization owned or controlled by it. The prohibition does not apply, however, to a loan or credit extension for any education, housing or humanitarian benefit available to all persons on a nondiscriminatory basis, or available in a geographic area that is accessible to all population groups without legal or administrative restriction.⁷

Section 308 prohibits, effective 45 days after enactment, a U.S. depository institution from accepting, receiving or holding a deposit account from the South African Government or any agency or entity owned or controlled by it, except accounts that the President authorizes for diplomatic or consular purposes. Section 310 prohibits, effective 45 days after enactment, any U.S. national from making, directly or through another person, any new investment in South Africa; the prohibition does not apply, however, to a firm owned by black South Africans.

Two provisions of the Act directly impinge upon United States treaties with the Republic of South Africa.

Section 306, paragraph (a) states that the President shall notify the South African Government "immediately" of his intention to suspend the route-servicing rights of any South African-designated air carrier under the

⁵ See sec. 128 of the Atomic Energy Act of 1954, as added by sec. 306 of the Nuclear Non-Proliferation Act of 1978, 42 U.S.C. §2157. See also sec. 1(c) of Exec. Order No. 12532, *supra* note 3, discussed in 80 AJIL at 154-55.

⁶ Done July 1, 1968, 21 UST 483, TIAS No. 6839, 729 UNTS 161.

⁷ Nor does the prohibition apply to loans or credit extensions under agreements entered into before the date of enactment of the Act. A comparable prohibition has been in effect under sec. 1(a) of Exec. Order No. 12532, *supra* note 3, discussed in 80 AJIL at 154.

Agreement between the two countries Relating to Air Services between their Respective Territories.⁸ The provision further states that the President shall, 10 days after the date of enactment, direct the Secretary of Transportation (1) to revoke the right of any South African-designated air carrier to provide service pursuant to the 1947 Agreement, and (2) not to permit or otherwise designate any U.S. air carrier to provide service between the United States and South Africa pursuant to the Agreement.

In addition, section 306(b) states that the Secretary of State shall terminate the Agreement in accordance with its provisions,⁹ and that the Secretary of Transportation, upon its termination, shall prohibit any aircraft of a foreign air carrier owned, directly or indirectly, by the South African Government or by South African nationals from engaging in air transportation with respect to the United States. The Secretary of Transportation shall also prohibit the takeoff and landing in South Africa of any aircraft owned, directly or indirectly, or controlled by a U.S. national or by any corporation or other entity organized under the laws of the United States or of any state. The Secretary of Transportation may, however, provide for exceptions to all the prohibitions as the Secretary considers necessary to provide for emergencies in which the safety of an aircraft or its crew or passengers is threatened.

Section 313 of the Comprehensive Anti-Apartheid Act of 1986 states that the Secretary of State shall terminate "immediately," in accordance with its terms, the Convention between the United States and South Africa for the Avoidance of Double Taxation and for Establishing Rules of Reciprocal Administrative Assistance with Respect to Taxes on Income, and the (supplementary) Protocol thereto.¹⁰

United States Government Activities

Section 314 of the Act prohibits any U.S. governmental department, agency or other entity from entering into a procurement contract for goods or services from parastatal organizations, except for items necessary for diplomatic and consular purposes. Section 315 prohibits any funds appropriated or otherwise made available by any provision of law from being used to promote U.S. tourism in South Africa. Section 316 effects a similar prohibition with respect to any investment assistance in or any subsidy for trade

⁸ May 23, 1947, 61 Stat. 3057, TIAS No. 1639, as amended July 21 and Nov. 2, 1953, 4 UST 2205, TIAS No. 2870, and June 28, 1968, 19 UST 5193, TIAS No. 6512.

⁹ On Oct. 8, 1986, Deputy Secretary of State John C. Whitehead dispatched a note to South African Ambassador Johannes Hermanus Albertus Beukes in which he requested "consultation pursuant to paragraph (B) of Article XI of the Agreement" and gave notice "pursuant to paragraph (D) of Article XI to terminate the Agreement. The Agreement shall terminate one year after the date of receipt of this notice, which is being simultaneously communicated to the International Civil Aviation Organization." Dept. of State File No. P86 0130-0731.

¹⁰ Dec. 13, 1946, 3 UST 3821, TIAS No. 2510, 167 UNTS 171; Protocol dated July 14, 1950, 3 UST 3821, TIAS No. 2510, 167 UNTS 188.

On Oct. 15, 1986, the Department of State notified the South African Embassy that, in accordance with Article XVIII of the Convention, the United States was terminating the Convention and Protocol, effective July 1, 1987. Dept. of State Staff Secretariat Log No. 8631623.

with South Africa, including funding for trade missions in South Africa and for participation in exhibitions and trade fairs in South Africa.

Section 322 prohibits any U.S. agency or entity from engaging in any form of cooperation, direct or indirect, with South African armed forces, "except activities which are reasonably designed to facilitate the collection of necessary intelligence," each of which is to be considered a "significant anticipated intelligence activity" for purposes of section 501 (congressional oversight) of the National Security Act of 1947 (50 U.S.C. §413 (1982)).

Title II of the Act, "Measures to Assist Victims of Apartheid," provides, among other things, for continuation of funding of the Human Rights Fund at the level (\$1.5 million) to which President Reagan had increased it in Executive Order No. 12532 of September 9, 1985.¹¹ Certain provisions based on the "Sullivan principles," set out in section 208(a) of the Act, are identical with section 2(c) of Executive Order No. 12532.¹² Section 207 requires the Secretary of State and any other head of a U.S. department or agency carrying out activities in South Africa to ensure that the principles govern (1) the direct hire of South Africans, (2) the reimbursement out of official residence funds of South Africans and employees of South African organizations for long-term employment services on behalf of the U.S. Government, and (3) contract employment services of South Africans.

Furthermore, section 206 requires the Secretary of State to acquire through lease or purchase residential properties in the Republic of South Africa to be made available at equitable rents to assist apartheid victims who are employees of the U.S. Government to obtain adequate housing, the properties to be acquired "only in neighborhoods which would be open to occupancy by other employees of the United States Government in South Africa." The amount of \$10 million is authorized to be appropriated for fiscal year 1987 for this purpose.

Section 211 contains a caveat, however, denying assistance under the Act to "any individual, group, organization, or member thereof, or entity that directly or indirectly engages in, advocates, supports, or approves the practice of execution by fire, commonly known as 'necklacing.'"¹³ This caveat is consistent with the U.S. policy against "necklacing" stated elsewhere in the Act (in section 108, in specific regard to the African National Congress, and in section 312(c), in general).¹⁴

¹¹ See 80 AJIL at 156-57.

¹² See *id.* at 155-56.

¹³ 100 Stat. 1098 (1986) (to be codified at 22 U.S.C. §5038).

¹⁴ On Sept. 4, 1986, President Reagan had continued in effect the national emergency he had declared by Exec. Order No. 12532, *supra* note 3. See 51 Fed. Reg. 31,925 (1986). On Oct. 27, 1986, the President issued Exec. Order No. 12571 implementing the Comprehensive Anti-Apartheid Act, *id.* at 39,505.

JUDICIAL DECISIONS

MONROE LEIGH

International Court of Justice—multilateral treaty reservation—use of force—non-intervention—collective self-defense—justiciability

MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA
(NICARAGUA v. UNITED STATES OF AMERICA). 1986 ICJ Rep. 14.
International Court of Justice, June 27, 1986.

On June 27, 1986, the International Court of Justice rendered its third opinion in *Nicaragua v. United States of America*. The Court's first Order, dated May 10, 1984, rejected the request of the United States that the case be "stricken from the list" for lack of jurisdiction, and the Court called on the parties to observe certain "provisional measures."¹ In its second opinion, on November 26, 1984,² the Court rejected all United States jurisdictional objections but one—the "Vandenberg reservation" (which was deferred)—and found that it had jurisdiction over the dispute under the optional clause (Article 36(2)) of the Statute of the International Court of Justice,³ and under the FCN Treaty between the United States and Nicaragua.⁴ After the Court's second opinion, the United States withdrew from further participation in the case and subsequently withdrew its acceptance of the compulsory jurisdiction of the Court, effective April 7, 1986.

In this third and decisive opinion, the Court accepted in part the U.S. contention that, because of the Vandenberg reservation, the Court lacked jurisdiction to apply the provisions of either the UN Charter or the OAS Charter to the dispute. The Court concluded, however, that the substance of the relevant provisions of these multilateral treaties may be found in customary international law. The Court held that the United States could not justify its military assistance to El Salvador or the contras in Nicaragua on the basis of a claim of collective self-defense since there was insufficient evidence of a Nicaraguan "armed attack." Accordingly, the United States was found to be in violation of *customary international law* prohibiting the use of force and intervention, as distinguished from any conventional international law prohibitions found in the multilateral Charters. The Court also found that the United States was in violation of its obligations under the bilateral FCN Treaty with Nicaragua. The Court reserved the assessment of damages for a fourth and final stage of the proceedings.

¹ See 1984 ICJ REP. 169, summarized in 78 AJIL 894 (1984).

² See Judgment on Jurisdiction and Admissibility, 1984 ICJ REP. 392, summarized in 79 AJIL 442 (1985).

³ The Statute of the International Court of Justice, annexed to the Charter of the United Nations, is set forth in 59 Stat. 1055 (1945), TS No. 993, at 25.

⁴ See Art. XXIV, Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States–Nicaragua, 9 UST 449, TIAS No. 4024. On May 1, 1985, the United States gave formal notice of termination that was to become effective on May 1, 1986.

On most issues the vote of the Court was 12-3, with Judges Schwebel, Oda and Jennings dissenting. The opinions are voluminous, running to more than five hundred pages including Judge Schwebel's dissent which, with its detailed factual appendix, accounts for nearly one-half of the total.

Under Article 36(2) of the Statute of the International Court of Justice, a number of states have made multilateral treaty reservations to the compulsory jurisdiction of the Court. In the case of the United States, the Vandenberg reservation excludes from the U.S. acceptance of the Court's compulsory jurisdiction "disputes arising under a multilateral treaty, unless . . . all parties to the treaty affected by the decision are also parties to the case before the Court."⁵ During the jurisdictional phase of the case, the United States asserted that other Central American states, which were parties to the UN and OAS Charters, would be affected by the Court's decision on the merits. This, it was argued, was particularly true of El Salvador whose application to intervene in the case was rejected by the Court in October 1984 without a hearing, even though El Salvador had claimed to be the victim of an illegal Nicaraguan armed attack. Therefore, the United States contended, the Court lacked jurisdiction to consider the Application of Nicaragua, which was based in large part on Article 2(4) of the UN Charter (prohibiting member states from resort to force) and on the provisions of the OAS Charter (prohibiting intervention as well as resort to force).

In its November 26, 1984 Judgment, the Court deferred its decision on this contention holding "that the objection based on the multilateral treaty reservation . . . does not possess, in the circumstances of the case, an exclusively preliminary character" within the meaning of the Rules of the Court.⁶ In its June 27, 1986 Judgment, the Court again addressed this issue and agreed in part with the U.S. contention that the Vandenberg reservation precluded the Court's jurisdiction over Nicaragua's claims founded on the provisions of the UN and OAS Charters. But the Court went on to vitiate this holding by construing the U.S. multilateral treaty reservation as a limitation on the *sources of law* that the Court could apply, rather than the *type of dispute* that the United States consented to have adjudicated by the Court. Thus, the Court found that it could apply customary international law prohibitions against the use of force and intervention even though precluded by the U.S. multilateral treaty reservation from directly applying Article 2(4) of the UN Charter and Articles 18 and 20 of the OAS Charter. This facile distinction attracted vigorous dissents from Judges Oda, Schwebel and Jennings. Judge Oda in particular pointed out:

The reference to multilateral treaties is merely a means of drawing the boundaries of jurisdiction so as to exclude certain disputes: there is no justification for supposing that a dispute "arising under" a multilateral treaty can nevertheless be brought under the Court's authority because (inevitably) it can also be analysed in terms of general international law.⁷

⁵ 1986 ICJ REP. 14, 31, para. 42.

⁶ See 1984 ICJ REP. at 425-26.

⁷ Dissenting Opinion of Judge Oda, 1986 ICJ REP. at 212, 218, para. 13.

Having concluded that it had jurisdiction to apply customary international law, the Court was obliged to deal with the principal substantive line of defense of the United States—namely, that its actions in Central America were fully justified as an exercise of its inherent right of collective self-defense in support of El Salvador's efforts to repulse armed attacks by Nicaragua. In rejecting this contention, the Court engaged in a lengthy analysis of the evidence and concluded:

The Court was not however satisfied that assistance has reached the Salvadorian armed opposition, on a scale of any significance, since the early months of 1981, or that the Government of Nicaragua was responsible for any flow of arms at either period. Even assuming that the supply of arms to the opposition in El Salvador could be treated as imputable to the Government of Nicaragua, to justify invocation of the right of collective self-defence in customary international law, it would have to be equated with an armed attack by Nicaragua on El Salvador. . . . [T]he Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State.⁸

The three dissenting judges challenged the Court's conclusion both on its findings of fact and on its statements of law. Judge Schwebel, whose dissent set forth the most complete treatment of the evidence, criticized the Court's Judgment because:

It misconceives and misapplies the law—not in all respects, . . . but in paramount respects: particularly in its interpretation of what is an "armed attack" . . . ; in its appearing to justify foreign intervention in furtherance of "the process of decolonization"; and in nearly all of its holdings as to which Party to this case has acted in violation of its international responsibilities and which, because it has acted defensively, has not. . . . I dissent from this Judgment because I believe that, in effect, it adopts the false testimony of representatives of the Government of the Republic of Nicaragua on a matter which, in my view, is essential to the disposition of this case⁹

The Court also enumerated a number of constraints on the invocation of the doctrine of collective self-defense which may have far-reaching implications for the future of the Court and its jurisprudence. Among these pre-conditions the most important were:

- (1) The victimized state must have "declared itself to be the victim of an armed attack."¹⁰
- (2) In addition, the victim of the attack must have requested assistance from its ally before the latter can rely on collective self-defense.¹¹
- (3) "States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack'."¹²

⁸ 1986 ICJ REP. at 119, para. 230.

⁹ Dissenting Opinion of Judge Schwebel, *id.* at 259, 266, para. 1.

¹⁰ 1986 ICJ REP. at 104, para. 195.

¹¹ *Id.* at 105, para. 199.

¹² *Id.* at 110, para. 211.

This leads one to the crucial factual interstices of the Court's Judgment. The Court concluded that Nicaragua's actions in providing arms to rebels in El Salvador did not amount to an "armed attack."¹³ Therefore, no right of collective self-defense arises under customary international law which, in this case, was presumed by the Court to follow the precise formulation found in Article 51 of the UN Charter, but which the Court is not permitted to apply directly because of its prior holding with respect to the U.S. multilateral treaty reservation. As Judge Jennings pointed out, however, under the Court's formulation,

it becomes difficult to understand what it is, short of direct attack by a[n] [aggressor] State's own forces, that may not be done apparently without a lawful response in the form of collective self-defence; nor indeed may be responded to at all by the use of force or threat of force.¹⁴

Judge Schwebel, for his part, quoted with approval Sir Humphrey Waldock in observing: "It would be a misreading of the whole intention of Article 51 to interpret it by mere implication as forbidding forcible self-defence in resistance to an illegal use of force not constituting an 'armed attack'."¹⁵

During the jurisdictional phase of the proceedings, the United States strenuously argued that the Nicaraguan Application was inadmissible for a number of reasons, including: (1) that a claim of unlawful use of armed force is committed to the exclusive competence of the Security Council by the UN Charter, and (2) that the judicial process is inherently incapable of resolving "ongoing armed conflict"—i.e., that the issue is not justiciable. Although both these arguments were rejected during the jurisdictional phase of the proceedings, the Court in paragraph 32 of its latest Judgment reexamined this contention in the light of "the existence of circumstances as a result of which, it might be argued, the dispute, or that part of it which relates to the questions of use of force and collective self-defence, would be non-justiciable."¹⁶ But the reexamination reached the same result as before and sheds little light on the Court's thinking.

Nevertheless, this iteration of the Court's finding drew forth a lengthy and illuminating dissent from Judge Oda in which he analyzed justiciability in international law. In his dissent, he reviewed all the prior cases before the Permanent Court of International Justice, as well as the present Court, and concluded: "Prior to the present case, therefore, there has never been an Article 36, paragraph 2, case before either the previous or the present Court where justiciability was doubtful because of the *substantive* nature of the dispute."¹⁷ On this basis, Judge Oda decided that Nicaragua's Application based on Article 36(2) should have been declared inadmissible.

With respect to the 1956 FCN Treaty, Nicaragua made a novel and radical argument to the effect not only that U.S. actions in Nicaragua breached

¹³ *Id.* at 119, para. 230.

¹⁴ Dissenting Opinion of Judge Jennings, *id.* at 528, 543.

¹⁵ Dissenting Opinion of Judge Schwebel, 1986 ICJ REP. at 348, para. 173.

¹⁶ 1986 ICJ REP. at 26, para. 32.

¹⁷ Dissenting Opinion of Judge Oda, *id.* at 235, para. 47.

specific provisions of that Treaty and were therefore justiciable under the disputes clause of the Treaty, but that such actions "deprived the Treaty of its object and purpose" and therefore were justiciable under the customary international law principle of *pacta sunt servanda*, apart from the provisions of Article XXIV of the Treaty.¹⁸ The Court rejected this argument in its starkest and broadest form, but then applied it with respect to "the narrower category of acts tending to defeat the object and purpose of the Treaty."¹⁹ In this connection, the Court recognized that if such actions were contemplated by the security exception clause (Article XXI) of the 1956 Treaty, the United States could not be considered in violation of customary international law on the theory of undermining the Treaty's object and purpose. Thus, the Court was required to analyze the scope of the security exception clause before it could apply its novel concept of customary international law. Although the Court ruled that certain acts of the United States could be considered within the contemplation of the contracting parties to the Treaty, acts such as mining, direct military attacks on ports and the economic embargo could not be considered necessary to protect "the essential security interests of the United States" within the meaning of the security exception clause of the Treaty.²⁰ This concept attracted words of caution and alarm from Judges Oda and Jennings in particular.

Curiously, the Court concluded its treatment of the Treaty by finding that the United States was also in breach of particular provisions of the Treaty in respect of the same group of actions, i.e., mining, direct attacks on ports and the economic embargo. One may wonder, therefore, why the majority chose to embrace a new and vague concept of international law liability when it intended, in any event, to reach the same substantive result by a straightforward application of the Treaty. Judge Oda pointed out in dissent that the seductive phraseology that clothes the Court's novel theory, taken from the Vienna Convention, is actually used for very different purposes. Indeed, he poignantly asks "where the jurisdiction granted by a treaty clause would ever end if it were held to entitle the Court to scrutinize any act remotely describable as inimical to the object and purpose of the treaty in question."²¹

Finally, the Court concluded its Judgment by rejecting Nicaragua's claim for interim damages in the amount of \$370 million and deferring all questions of reparations to the fourth and final phase of the proceedings.

This Judgment on the merits is surely a momentous one, momentous in its implications for the development of international law, and momentous for its political implications for the Court as an international institution. The Court has adopted a number of controversial—indeed dubious—legal positions: (1) that General Assembly resolutions constitute *opinio juris* for purposes of determining customary international law; (2) that the multilateral treaty reservation does not exclude the Court's application of customary

¹⁸ 1986 ICJ REP. at 135, para. 270.

¹⁹ *Id.* at 137, para. 273.

²⁰ *Id.* at 141-42, para. 282.

²¹ Dissenting Opinion of Judge Oda, *id.* at 250, para. 81.

international law even where that law has been codified in the multilateral treaty as to which the reservation is effective; (3) that the Court may proceed to judgment even when an indispensable party is not present; (4) that an indispensable party claiming to be the victim of aggression (i.e., El Salvador) does not have an absolute right to intervene under Article 63 of the Statute of the International Court of Justice as heretofore thought; (5) that such a party may be denied intervention without a hearing; (6) that a state may not exercise the inherent right of self-defense, unless the attack upon it amounts to an outright "armed attack"; (7) that an allied state may not exercise the right of collective self-defense unless there is a formal claim by a state that it is the victim of armed attack and a formal request for help; (8) that issues arising out of an ongoing armed conflict are fully justiciable by the Court; and finally, (9) that on the facts of this case, despite the voluminous evidence before the Court, Nicaragua had not engaged in an armed attack on El Salvador. Moreover, with respect to treaty law, the Court has loosed upon the international scene a rogue elephant of a proposition to the effect that certain acts, although not violative of any provision of a bilateral treaty, may nevertheless amount to a new international delict styled as an act tending to "defeat the objects and purposes of a treaty."

Quite possibly some members of the Court majority would maintain in the privacy of their consciences that a certain degree of willfulness in the application of legal concepts is justified in bringing the law to bear on a superpower that had accepted the Court's compulsory jurisdiction, especially a recalcitrant superpower that had moved unwisely on the very eve of Nicaragua's Application to suspend its acceptance of compulsory jurisdiction and later, and even more unwisely, had withdrawn from further defense of its position before the Court. No doubt, members of the Court majority would also say that the world would be a better place if the Court could establish itself as a supreme judicial court within a perfectly functioning institutional structure and could enforce its writ against all nations large and small. But the United Nations functions with increasing infirmity and is manifestly incapable of performing its primary duty of maintaining the peace. In the face of this institutional imperfection, the right of self-defense, both individual and collective, occupies a position of massive importance in maintaining international stability against the threat of indirect aggression—the chosen instrument of authoritarian destabilization. That the majority of the Court should undertake not merely to narrow and straitjacket the principle of collective self-defense, but also to exonerate Nicaragua from responsibility for its undoubted support of attacks on El Salvador, after having denied El Salvador's request to participate in the case without a hearing, is cause for profound concern about the future of the Court as an international institution. In the short run, its action has assured the withdrawal of the only superpower that had accepted the Court's compulsory jurisdiction. In the long run, more such withdrawals seem inevitable, not merely from the Court's jurisdiction under the compulsory clause (Article 36(2)) but also from scores of dispute clauses in bilateral treaties. Indeed, it may not be too much to say that compulsory jurisdiction under Article 36(2), after more than a half century of sporadic and uncertain growth, is now moribund.

Countervailing duties—applicability of U.S. countervailing duty law to state-controlled economies

GEORGETOWN STEEL CORP. v. UNITED STATES. Appeal No. 85-2805.
U.S. Court of Appeals, Fed. Cir., September 18, 1986.

Plaintiffs, a group of U.S. steel companies, filed countervailing duty petitions with the Department of Commerce, International Trade Administration, alleging that producers of carbon steel wire rod from Czechoslovakia and Poland had received various export subsidies from their governments, and requesting that countervailing duties be imposed on imports of wire rod from those countries. Similar petitions were filed regarding potash from the Soviet Union and the German Democratic Republic. In the wire rod cases, the Commerce Department issued negative final determinations, concluding that the countervailing duty law (19 U.S.C. §1303 (1982))¹ does not apply to nonmarket economies. The Commerce Department then rescinded the investigations in the potash cases, relying on the same rationale. Petitions for review were filed and the cases were consolidated before the Court of International Trade, which reversed the Commerce Department.² On appeal by the United States, the Court of Appeals for the Federal Circuit (per Friedman, J.) reversed and *held*: that the finding of the Commerce Department that the countervailing duty law does not apply to state-controlled economies, and hence its decision to deny petitioners relief under the statute, were neither unreasonable nor an abuse of discretion.³

The court began by noting that when the countervailing duty law was first enacted in 1897,⁴ no state-controlled economies existed. Congress, therefore, had no reason to address the issue. Since that time, Congress has amended the statute six times, without making any relevant changes. The court of appeals inferred from this situation that Congress did not intend to expand the applicability of the statute to state-controlled economies.

¹ Because the countries under investigation were not signatories to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 UST 513, TIAS No. 9619 ("Subsidies Code"), they did not receive the benefit of treatment under title VII of the Trade Agreements Act of 1979, 19 U.S.C. §§1671-1677g (1982), which requires a showing that a domestic industry has been injured by subsidized imports before countervailing duties may be imposed.

² See *Continental Steel Corp. v. United States*, 614 F.Supp. 548 (1985), summarized in 80 AJIL 359 (1986).

³ Before the court of appeals reached the merits, it was compelled to resolve the question whether the appeal of the wire rod decisions had been timely filed. According to established procedure, the U.S. steel companies had filed a summons in the Court of International Trade within 30 days after publication of the Department's final order. They then mailed the complaint within 30 days thereafter, as required by 19 U.S.C. §1516a(a)(2)(A). The complaint, however, was returned because of insufficient postage. Petitioners then remailed the complaint with adequate postage, but by this time the 30-day filing deadline had expired. In this circumstance, the court of appeals held that the complaint should have been dismissed as untimely. Because the filing deadline is imposed by statute, the court concluded that its limitations must be strictly observed. Accordingly, the court remanded that portion of the appeal to the Court of International Trade with directions to dismiss the complaint for lack of jurisdiction. The court decided the merits of the appeal, therefore, only in the context of the potash cases.

⁴ See Tariff Act of July 24, 1897, ch. 11, §5, 30 Stat. 151, 205 (1897).

Finding no explicit evidence that Congress had ever addressed the issue, the court then undertook to determine whether Congress would have applied the statute to state-controlled economies when it was first enacted, had Congress been aware of the issue at that time. The court noted that the purpose of the countervailing duty law is " 'to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments.' " ⁵ According to the court, subsidies give a foreign producer an "unfair" competitive advantage and enable a producer to make low-priced sales in the United States that presumably would otherwise be infeasible. This type of unfair competition, the court of appeals found, cannot exist in the case of a state-controlled economy. By definition, the entire production and marketing environment in a state-controlled economy is governed by the state itself and " 'is riddled with distortions.' " ⁶ Foreign trade is conducted by government instrumentalities on terms set by the government. Thus, the benefits that were claimed to be subsidies in the present case did not necessarily enable sales to occur in the United States at prices lower than would otherwise have obtained. Those benefits could not, the court decided, be found to "create the kind of unfair competitive advantage over American firms against which the countervailing duty act was directed." ⁷ Indeed, there was no way of determining whether the challenged benefits enabled the exporting government instrumentalities to make sales they otherwise could not have profitably made, or whether the sales would have been made at higher prices in the absence of those benefits.

The court found support for its interpretation by reviewing congressional activity vis-à-vis other statutory provisions directed at imports from countries with state-controlled economies. In 1974 and again in 1979, Congress amended the antidumping law to include a specific provision directed at dumping from state-controlled economies. Whether and to what extent dumping exists is typically determined by comparing the U.S. price of the merchandise in question with its price in the exporting country. Recognizing that prices in the exporting nations are unreliable bases of comparison in cases involving state-controlled economies, Congress created a special rule for investigations involving such countries.

While amending the antidumping law specifically to address imports from state-controlled economies, Congress made no changes in the countervailing duty law. The court of appeals concluded that this juxtaposition of congressional action and silence "strongly indicates that Congress did not believe that the [countervailing duty] law covered" state-controlled economies. ⁸ The court acknowledged that the Subsidies Code, which Congress approved in the 1979 Act, authorized signatories to regulate imports from state-controlled economies through either the antidumping or the countervailing duty law. However, the mere fact that Congress had been given the authority

⁵ No. 85-2805, slip op. at 15 (quoting *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1978)).

⁶ Slip op. at 16 (quoting *Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 19,374, 19,376 (1984) (Final)).

⁷ Slip op. at 17.

⁸ *Id.* at 21.

to use the countervailing duty law did not necessarily imply that it had exercised that authority. The court, therefore, rejected the Court of International Trade's rationale that Congress's approval of the Subsidies Code evidenced an intent that the countervailing duty law apply to state-controlled economies.

Finally, the court dismissed the argument that its interpretation would turn the countervailing duty law on its head, by exempting from its coverage those nations that are the "worst distorters" of world markets.⁹ The court explained that Congress had already determined that those countries' distortions should be addressed through the antidumping law. To the extent the remedies provided by that law are inadequate, relief must be provided by Congress, not the courts.

Foreign Sovereign Immunities Act—no retroactive application to confer jurisdiction

JACKSON v. PEOPLE'S REPUBLIC OF CHINA. 794 F.2d 1490.

U.S. Court of Appeals, 11th Cir., July 25, 1986.

Plaintiffs, investors in bearer bonds issued by the Imperial Government of China in 1911 to finance the construction of a railroad, sought review of a decision setting aside a default judgment against the People's Republic of China (PRC) and dismissing the lawsuit for lack of subject matter jurisdiction. The Court of Appeals for the Eleventh Circuit (per Godbold, C.J.) affirmed both decisions, and *held* that: (1) the district court did not abuse its discretion in setting aside the default judgment against the PRC in light of the PRC's meritorious defenses and U.S. foreign policy interests; and (2) the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602-1611 (1982)) (FSIA) does not apply retroactively to confer subject matter jurisdiction over transactions that occurred prior to 1952.

Plaintiffs filed this class action in the U.S. District Court for the Northern District of Alabama, seeking payment on certain bonds that had been issued by the Imperial Government of China and were allegedly in default. Plaintiffs claimed jurisdiction existed under the Foreign Sovereign Immunities Act. When the PRC failed to appear in court, claiming absolute sovereign immunity,¹ the district court ordered a default and subsequently entered a judgment for over \$41 million for unpaid principal and interest on the bonds.² Following plaintiffs' initial efforts to execute the judgment, the PRC filed motions to vacate the judgment under Rule 60(b) of the Federal Rules

⁹ *Id.* at 23.

¹ The PRC maintained that the doctrine of restrictive sovereign immunity, as embodied in the FSIA, was not a rule of international law and, therefore, was not binding upon nations that did not agree to be subject to the rule. The district court did not rule on the international law questions because it found that the suit was barred under U.S. domestic law.

² See *Jackson v. People's Republic of China*, 550 F.Supp. 869 (N.D. Ala. 1982), summarized in 77 AJIL 146 (1983).

of Civil Procedure³ and to dismiss the case.⁴ The district court determined that the default judgment should be vacated in light of the PRC's defenses regarding subject matter and in personam jurisdiction, as well as the United States foreign policy interest in having the judgment reopened.⁵ Thereafter, the district court conducted an evidentiary hearing on the motion to dismiss and ultimately dismissed the action for lack of subject matter jurisdiction, finding that the FSIA could not be applied retroactively to the activities that were the subject of the suit.⁶

The Court of Appeals for the Eleventh Circuit affirmed both decisions of the district court.⁷ First, the court determined that the district court had not abused its discretion in setting aside the default judgment, noting that the case presented extraordinary circumstances that warranted relief under Rule 60(b)(6). The appellate court upheld the district court's conclusion that the PRC's claims of lack of subject matter jurisdiction and the foreign policy implications of the default judgment justified resolution of the case on the merits. Relying heavily on two statements of interest filed by the United States, the court concluded that the PRC was unfamiliar with U.S. judicial practice because of limited communications between the two Governments, which led to a "misconception by [this] ancient and proud sovereign of its responsibility to reply to the demands of a United States court whose authority it does not recognize as a matter of international law, at a time when concepts of United States law and international law are changing."⁸

The second and more critical issue for the appellate court was whether Congress had intended the FSIA to apply to transactions that predated 1952.⁹

³ The PRC sought dismissal under Rule 60(b), subparagraphs (1), (4) and (6), which state:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (4) the judgment is void; . . . (6) any other reason justifying relief from the operation of the judgment.

⁴ The PRC did not appear at the district court. The Departments of State and Justice filed two statements of interest in support of the PRC's motions and representatives of the U.S. Government were present at the district court, but did not participate.

⁵ See *Jackson v. People's Republic of China*, No. 79-C-1272-E (N.D. Ala. Feb. 27, 1984), summarized in 78 AJIL 675 (1984).

⁶ See *Jackson v. People's Republic of China*, 596 F.Supp. 386 (N.D. Ala. 1984), summarized in 79 AJIL 456 (1985).

⁷ On appeal, the PRC filed a brief but did not present oral argument. The United States filed a statement of interest and argued before the appellate court. Plaintiffs' motion for a rehearing was denied. 801 F.2d 404 (11th Cir. 1986) (en banc).

⁸ 794 F.2d 1490, 1496.

⁹ Prior to 1952, U.S. courts granted foreign sovereigns complete immunity from suit if so requested by the State Department. In 1952, the State Department issued the "Tate letter," which adopted the restrictive theory of foreign sovereign immunity, limiting sovereign immunity to suits involving public activities. After the Tate letter was issued, courts granted sovereign immunity either in response to suggestions by the State Department or on their own initiative where foreign governments failed to ask the State Department to intervene. In 1976, Congress passed the FSIA to clarify the standards of restrictive sovereign immunity, to free the Government from diplomatic pressures and to place the jurisdictional determination squarely in the hands of the courts. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

Affirming the district court's decision, the appellate court stated that a strong presumption exists that statutes are to apply prospectively, and that the statutory language and the legislative history of the FSIA supported its prospective application. Relying upon Senate and House reports containing statements that the FSIA was not intended to affect the "substantive law of liability," the court observed that retroactive application of the statute to pre-1952 events would interfere with the rights of foreign sovereigns and U.S. principles of law that existed prior to 1952. The court concluded that "[i]t would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 by the enactment of a statute nearly three quarters of a century later."¹⁰ Moreover, the court found no case where the FSIA was applied to confer subject matter jurisdiction over pre-1952 activities.

Prior to the Eleventh Circuit's decision, at least one court had applied the FSIA to a case filed before the statute's effective date,¹¹ leaving open the question whether Congress had intended that the FSIA would convey jurisdiction in all future claims under the statute.¹² The court's ruling here decisively resolves this question for cases involving transactions or activities that occurred prior to 1952. The decision still leaves unanswered, however, the issue whether a U.S. court may assert subject matter jurisdiction over a foreign sovereign for claims arising out of activities occurring between 1952 and January 1977, the effective date of the FSIA. The court stated that the FSIA's language evidenced prospectivity and, under the court's reasoning, application of the FSIA to actions arising between 1952 and 1977 would interfere with a foreign sovereign's rights under international legal principles of absolute sovereign immunity that arguably existed prior to 1977.¹³

The decision also highlights the State Department's significant role in cases involving foreign nations, even with the FSIA firmly in place. Although the State Department, at the time the FSIA was enacted, had reserved its right to submit amicus briefs in cases involving foreign sovereigns, the *Jackson* case is the first time that the Department has participated in such cases. Moreover, the State Department's views apparently persuaded the court to reach its decision, which suggests that where foreign policy interests are at issue, the State Department may assume a role similar to the one it played prior to enactment of the FSIA.

¹⁰ 794 F.2d at 1498.

¹¹ See *Yessenin-Volpin v. Novosti Press Agency*, 443 F.Supp. 849 (S.D.N.Y. 1978). The Eleventh Circuit distinguished this case on the basis that the court did not address the jurisdictional aspects of the FSIA, but rather applied the substantive law of foreign sovereign immunity that is embodied in the FSIA. See 794 F.2d at 1498.

¹² But see *Corporacion Venezolana de Fomento v. Vintero Sales*, 629 F.2d 786 (2d Cir.), cert. denied, 449 U.S. 1080 (1980) (court found "henceforth" language in FSIA applied to substantive immunity provisions and not to jurisdictional provisions).

¹³ Plaintiffs argued that the bonds were renegotiated in 1937 and matured in 1976. Plaintiffs failed to claim retroactivity only back to 1952, however, insisting that "[t]he act is either retroactive or it is not." 794 F.2d at 1499 (quoting Appellants' Reply Brief at 31).

Trademarks—grey market goods—U.S. Customs Service regulations held invalid

COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS v. UNITED STATES. 790 F.2d 903.

U.S. Court of Appeals, D.C. Cir., May 6, 1986.

Plaintiffs, the Coalition to Preserve the Integrity of American Trademarks (COPIAT), a trade association of U.S. companies that own or are affiliated with the owners of American trademarks, and two of its members brought suit against the United States in the U.S. District Court for the District of Columbia seeking a declaration that U.S. Customs Service regulations (19 C.F.R. §133.21(c)(1)(3) (1985)) permitting the importation of "grey market goods" into the United States were inconsistent with section 526 of the Tariff Act of 1930 (19 U.S.C. §1526 (1982)) and section 42 of the Lanham Trade-Mark Act of 1946 (15 U.S.C. §1124 (1982)). Plaintiffs also sought an injunction prohibiting enforcement of the regulations and compelling enforcement of the express terms of the statutes.

"Grey market goods" are goods manufactured abroad that bear a foreign trademark identical to an American trademark, and that are imported for sale in the United States without the authorization of the U.S. trademark owner. The Customs Service regulations permit importation of these goods if the identical American and foreign trademarks are owned by the same or affiliated entities or if the American trademark owner has authorized the foreign entity's use of the trademark.

The district court upheld the regulations as a "sufficiently reasonable" interpretation of the governing statutes "supported by legislative history, judicial decisions, legislative acquiescence, and the long-standing consistent policy of the Customs Service."¹ A unanimous three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit (per Silberman, J.) reversed and *held*: that the Customs Service regulations violated section 526 of the Tariff Act, which does not permit any exceptions based upon the relationship of the American and foreign trademark owners or upon the American owner's authorization of the use of a trademark abroad. The court also held that while the appellants were entitled to declaratory relief, an injunction would be inappropriate.

The court of appeals first determined that the district court had properly asserted jurisdiction over the case. In this regard, the court rejected the finding of the U.S. Court of Appeals for the Federal Circuit in *Vivitar Corp. v. United States*² that 28 U.S.C. §1581(a) provides the U.S. Court of International Trade with exclusive jurisdiction over section 526 actions.

The court next considered the central issue of the case—whether the regulations were consistent with section 526 of the Tariff Act of 1930. Section 526 makes it unlawful "to import into the United States any merchandise of foreign manufacture if such merchandise . . . bears a trademark owned by a citizen of, or by a corporation or association created or organized within,

¹ Coalition to Preserve the Integrity of American Trademarks v. United States, 598 F.Supp. 844, 852 (D.D.C. 1984).

² 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 106 S.Ct. 791 (1986).

the United States, and registered in the Patent and Trademark Office." Unlike the district court, the appellate court found that deference to the interpretation by the agency of its governing statute was inappropriate where, as in the case at bar, the language of the statute unambiguously expressed congressional intent on the matter at issue. Alternatively, the court of appeals held that the Customs Service regulations were invalid because they did not constitute a reasonable interpretation of section 526.

In reaching its decision, the appellate court did not merely rely on the clear mandate of the statute, but also carefully examined the facts surrounding the enactment of section 526, its subsequent judicial and legislative history, and the regulatory history of the applicable Customs Service regulations. The court began with a review of *A. Bourjois & Co. v. Katzel*,³ an early grey market case where the Second Circuit found in favor of the defendant. Although the Supreme Court subsequently reversed *Katzel*,⁴ the appellate court noted that Congress passed section 526 after the *Katzel* decision, rejecting without qualification the legal theory underlying the Second Circuit's opinion. Reviewing the legislative history, the court concluded that Congress had intended section 526 to confer "an absolute, unqualified property right upon American companies that own registered trademarks."⁵ The court pointed out that while the House and Senate conferees explicitly limited the scope of section 526 to foreign-made goods and extended its protection to American companies only, they had refused to address the issue of an American subsidiary of a foreign company. The court inferred from the congressional debate that Congress consciously drew the line at American companies and did not adopt distinctions among different categories of American companies.

The court of appeals also pointed out that the subsequent reenactment of the statute and its contemporaneous constructions indicated that the scope of section 526 was intended to be broad. First, the court asserted that the 1930 reenactment of the statute and Congress's refusal to delete the clause demonstrated that section 526 was intended to bar absolutely importation of goods bearing an American company's trademark. Second, the appellate court concluded that contemporaneous interpretations of the statute by courts and by the U.S. Customs Service did not support any implied limitations on the scope of section 526.

In light of this reading of the statute and its history, the court was not persuaded that the regulations constituted a reasonable, longstanding administrative interpretation of the statute impliedly accepted by Congress. Neither the 1923 nor the 1931 Customs Service regulations implementing section 526 recognized any exceptions to the statute's express terms. It was not until 1936 that the Customs Service promulgated Article 518 and began to permit the importation of grey market goods without the owner's consent.

³ 275 F. 539 (2d Cir. 1921).

⁴ 260 U.S. 689, 692 (1923). See also *Osawa & Co. v. B & H Photo*, 589 F.Supp. 1163, 1173 (S.D.N.Y. 1984).

⁵ 790 F.2d 903, 910.

The 1936 regulations, however, did not purport to interpret section 526. Moreover, the Customs Service provided no explanation for this change in policy. The court also concluded that the 1972 promulgation of the current regulations had been motivated by a desire to accommodate certain antitrust concerns of the Justice Department. A subsequent change in prevailing antitrust doctrine, however, made these concerns irrelevant and prompted the Justice Department to state that section 526 "ought to be enforced according to its express terms," a pronouncement patently inconsistent with the Customs Service regulations, which created an implied exception.

The court also rejected the view that the legislative history indicated congressional acceptance of the Customs Service's interpretations. To the appellate court, unsuccessful efforts in 1954 and 1959 to repeal or modify section 526 suggested that Congress had actually rejected the views of the Customs Service. Finally, the court did not accept the appellees' reliance on the Federal Circuit's holding in *Vivitar* that even if the regulations did not represent a reasonable interpretation of the statute, they could be upheld "as a reasonable exercise of administratively initiated enforcement." The court noted that the Customs Service itself had regarded the regulations as an interpretation of section 526 and not as an exercise of its enforcement discretion.

Shortly after the D.C. Circuit's decision in *COPIAT*, the United States Court of Appeals for the Second Circuit in *Olympus Corp. v. United States*,⁶ in a two-to-one decision decided that the Customs Service's grey market regulations, while unsound as a matter of policy, were not such a clear abuse of discretion that they should be considered unlawful. Unlike the *COPIAT* court, the Second Circuit opinion (per Oakes, J.) does not review the law in this area in detail, but merely decides that the Customs Service had consistently refused to enforce section 526, that Congress's failure to change the Service's practice legitimates that interpretation, and that customs regulations may be upheld even if they were adopted for a reason other than that advanced by the agency in promulgating the rule.

This clear conflict in the circuits will lead to a Supreme Court review of the matter.⁷ The Court should support the decision of the D.C. Circuit in the *COPIAT* case for several reasons. First, section 526 could not be clearer. Second, although the legislative history is ambiguous, if it proves anything, it proves that the statute is to be read broadly. Third, consideration of this statute from time to time by Congress supports the notion that Congress recognized that the statute was broad and decided to leave it unchanged. Fourth, the Customs Service administration of the statute over the years has not been consistent. Finally, the *Olympus* court's reliance on subsequent legislative history and the alleged administrative burden that would be created if section 526 were enforced fully is—as noted by Judge Winter in his dissenting opinion—unsupported by either evidence or common sense.

⁶ 792 F.2d 315 (2d Cir. 1986).

⁷ The Supreme Court recently granted certiorari. *Cert. granted sub nom. K Mart Corp. v. Cartier, Inc.*, 55 U.S.L.W. 3411 (U.S. Dec. 8, 1986).

Foreign Sovereign Immunities Act—"foreign state"—Trust Territory of the Pacific Islands—statehood under international law

MORGAN GUARANTY TRUST CO. v. REPUBLIC OF PALAU. 639 F.Supp. 706. U.S. District Court, S.D.N.Y., July 10, 1986.

Plaintiffs, a group of five banks, brought an action in New York State court to recover for an alleged default by the Republic of Palau (Palau) on a \$35 million loan to finance an electric power plant on Palau. Pursuant to the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330(a), 1441(d), 1602–1611 (1982)) (FSIA), Palau removed the action from state to federal court. The U.S. District Court for the Southern District of New York (per Sweet, J.) denied plaintiffs' motion to remand the action to state court and *held*: Palau was a "foreign state" within the meaning of the FSIA and was therefore entitled to have its case heard in federal court.

The sole issue before the court in ruling on plaintiffs' motion was whether Palau was a "foreign state" within the meaning of the FSIA. Noting that the FSIA does not define the term "foreign state," the court turned to U.S. case law for guidance as to the definition of "sovereignty," which the court understood to be "'legal shorthand for legal personality of a certain kind, that of statehood.'"¹ The court then reviewed Palau's political development: Palau, along with other islands constituting Micronesia, had been governed by Japan prior to World War II pursuant to a League of Nations mandate. In 1947, the United States and the UN Security Council entered into a trusteeship arrangement which designated Palau as a "strategic trust" to be administered by the United States.² Palau subsequently adopted its own Constitution, effective January 1, 1981, and entered into commercial and diplomatic agreements and treaties with other nations, primarily on matters of regional concern such as fishing and environmental protection. Moreover, Palau joined several international organizations, established its own flag and was in the process of establishing a sovereign relationship with the United States pursuant to a Compact of Free Association.³ Although prior judicial decisions had found Palau not to be a foreign state because the United States exercised broad authority over the territory,⁴ the court took particular note

¹ 639 F.Supp. 706, 712–13 (quoting I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 110 (3d ed. 1979)).

² See Trusteeship Agreement for the Former Japanese Mandated Islands, *approved by* UN Security Council Apr. 2, 1947, United States July 18, 1947, 61 Stat. 3301, TIAS No. 1665, 8 UNTS 189 [hereinafter cited as Trusteeship Agreement].

³ Compact of Free Association, *done at* Palau, Jan. 10, 1986, U.S.-Palau [hereinafter cited as Compact], *reprinted in* S. REP. NO. 403, 99th Cong., 2d Sess. (1986). The history of the adoption of the Constitution and the negotiation of the Compact is complex and interrelated. See S. REP. NO. 403, *supra*, at 24–26; see also Armstrong & Hills, *The Negotiations for the Future Political Status of Micronesia (1980–1984)*, 78 AJIL 484 (1984); Armstrong, *The Emergence of the Micronesians into the International Community: A Study of the Creation of a New International Entity*, 5 BROOKLYN J. INT'L L. 207 (1979).

⁴ See *Bowoon Sangsa Co., Ltd. v. Micronesia Indus. Corp.*, 720 F.2d 595, 602 (9th Cir. 1983) (although Palau was moving toward independence, the courts of Palau could not be considered foreign until Palau obtained a status approaching complete independence).

of developments in Micronesia as well as subsequent changes in Palau's political status and distinguished the earlier precedents.

The court also rejected plaintiffs' argument that Palau could not be a "foreign state" until the termination of the prior Trusteeship Agreement, which granted the United States "full powers of administration, legislation, and jurisdiction" over Palauan affairs.⁵ The court declined "to close its eyes to the *de facto* degree of sovereignty which the Palauans have exercised since the adoption of the Constitution and the Compact"⁶ and stated that "Palau has reactivated a sovereignty which had been dormant."⁷ According to the decision, "[f]ederal courts have often used concepts of *de facto* sovereignty to evaluate their jurisdiction over nations in political transition."⁸ In the court's opinion, "the foundation laying period has ended and the transition to sovereign equality has begun,"⁹ noting that the language of the Compact recognized that "the people of Palau have and retain their sovereignty and their sovereign right to self-determination and the inherent right to adopt and amend their own constitution and form of government."¹⁰ Even though the Compact had not been ratified and the termination of the Trusteeship Agreement had not been approved by the Security Council, the court found that the United States, by entering into a consensual relationship, and Palau, by independently determining its political destiny, had "effectively, if not actually, dissolved" the trusteeship arrangement.¹¹ In addition, on the basis of the drafting history of the Trusteeship Agreement, the court noted that the United States had never claimed sovereignty over Palau. Finally, the court stated that "[r]ecognizing Palau as a foreign state also comports with the policies behind the [FSIA]," namely, "to ensure uniformity of decision in the interests of foreign relations."¹²

The date of the commencement of a new state, in particular in the context of the decolonization process and the emancipation of former mandates and trust territories toward self-government or independence, has been an issue of discussion and controversy.¹³ In recognizing sovereignty as an "ephemeral concept" and rejecting as "mechanical jurisprudence" an approach based on determining the exact date when a foreign state comes into existence,¹⁴ Judge Sweet adopted the view that the creation of a new legal entity is a gradual process. This view appears to be in line with the reality of interna-

⁵ Trusteeship Agreement, *supra* note 2, Art. 3.

⁶ 639 F.Supp. at 713.

⁷ *Id.* at 714.

⁸ *Id.* at 713 (citing *Murarka v. Bachrack Bros.*, 215 F.2d 547 (2d Cir. 1954) (de facto recognition of India by the United States prior to India's complete independence), and *Betancourt v. Mutual Preserve Fund Life Ass'n*, 101 F. 305 (C.C.S.D.N.Y. 1900) (de facto recognition of Cuba subsequent to end of U.S. occupation after U.S.-Spanish War of 1898)).

⁹ 639 F.Supp. at 714.

¹⁰ Compact, *supra* note 3, Preamble, cl. 6, and Art. 1, §§111 and 121.

¹¹ 639 F.Supp. at 714.

¹² *Id.* at 716.

¹³ See generally J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (1979); Macdonald, *Termination of the Strategic Trusteeship: Free Association, the United Nations and International Law*, 7 BROOKLYN J. INT'L L. 235 (1981).

¹⁴ 639 F.Supp. at 712 (relying on *United States v. Spelar*, 338 U.S. 217, 223 (1949) (Frankfurter, J., concurring)).

tional relations and particularly appropriate where the new legal entity may opt for free association with another nation and not for independence in the traditional sense. As a matter of fact, the UN Trusteeship Council has already noted that the people of Palau have freely exercised their right to self-determination and recommended that the Trusteeship Agreement be formally terminated upon the entry into force of the Compact and the corresponding agreements between the United States and the other Pacific trust islands.¹⁵ It seems unlikely that this assessment will be revised in light of the recent invalidation by Palauan courts of Palau's ratification of the Compact.¹⁶ To the contrary, this act of Palau's judiciary may arguably be deemed another indication of the degree of independence Palau's political institutions have achieved.

ICSID ARBITRAL DECISION

Arbitration—annulment of arbitral award for failure to apply law applicable under ICSID Convention and failure to state sufficiently pertinent reasons

AMCO ASIA CORP. v. REPUBLIC OF INDONESIA. Case No. ARB/81/1.
Ad hoc Committee, International Centre for Settlement of Investment Disputes, May 16, 1986.

In 1968, AMCO Asia Corp. (AMCO), a Delaware corporation, agreed with P.T. Wisma Kartika (P.T. Wisma), an Indonesian corporation owned by an Indonesian cooperative connected with the Indonesian Army, to complete an office, shop and hotel construction project in Jakarta, Indonesia. Upon completion of the construction, AMCO was to lease and manage the hotel complex for an extended period of time under a profit-sharing arrangement with P.T. Wisma. In compliance with Indonesian foreign investment laws,¹ AMCO obtained a foreign investment license from the Indonesian Government which set forth the conditions for project performance and investment.

¹⁵ TC Res. 2183 (LIII) (May 28, 1986), UN Doc. S/18124, reprinted in S. REP. NO. 403, *supra* note 3, at 362-63.

¹⁶ The current version of the Compact was approved by both houses of the Palau National Congress on Jan. 24, 1986, and subjected to a referendum held on Feb. 21, 1986, which was observed by a UN mission. Subsequently, the President of Palau certified that the Compact had been approved in compliance with Palau's Constitution. The President of the United States then submitted to the U.S. Congress a draft joint resolution to approve the Compact. See H.R.J. Res. 626 and S.J. Res. 77, 99th Cong., 2d Sess. (1986). The measures were favorably reported out of the House Committee on Interior and Insular Affairs in July 1986 (see H.R. REP. NO. 663, 99th Cong., 2d Sess. (1986)), and the Senate Committee on Energy and Natural Resources in August 1986 (see S. REP. NO. 403, *supra* note 3). On Sept. 17, 1986, however, the Appellate Division of the Supreme Court of Palau confirmed a summary judgment of the Trial Division of the Supreme Court invalidating the ratification of the Compact by the President of Palau. *Gibbons v. Sali*, No. 8-86 (App. Div. 1986) (certain Compact provisions permitting the United States or nations designated by it to bring nuclear substances into the territory of Palau were not approved by the constitutionally mandated majority).

¹ (Indonesian) Foreign Capital Investment Law, Act. No. 1/1967 (Jan. 1967).

When the construction work was substantially completed, disputes arose over the management of the hotel, culminating in P.T. Wisma's taking over control of the hotel in 1980, with Indonesian military and police personnel participating in the takeover. Upon application by P.T. Wisma, the Indonesian Government then revoked AMCO's investment license for failure to comply with certain Indonesian legal requirements. AMCO and its Indonesian subsidiary unsuccessfully contested the forcible takeover and the revocation of the license in court proceedings in Indonesia. In 1981, AMCO also commenced arbitration proceedings against Indonesia at the International Centre for Settlement of Investment Disputes (ICSID).² In an award dated November 21, 1984, a tribunal of three jurists found that Indonesia had failed to protect AMCO against an illegal taking of its investment and had revoked the investment license without due process and for insufficient reason. Accordingly, the tribunal awarded damages to AMCO in an amount equal to the net present value of AMCO's investment, calculated on the basis of the discounted projected net cash flow generated by the investment.³

Subsequently, the Indonesian Government sought to annul the award, invoking several of the grounds set forth in Article 52 of the ICSID Convention; namely, that "the Tribunal has manifestly exceeded its powers," "there has been a serious departure from a fundamental rule of procedure" and "the award has failed to state the reasons on which it is based."⁴ On May 16, 1986, after extensive briefing and hearings, an ad hoc committee composed of three new jurists upheld the tribunal's finding that the takeover of the hotel by P.T. Wisma with the help of military and police personnel was illegal under Indonesian law, but annulled the award in every other respect and *held* unanimously that the tribunal had: (1) manifestly exceeded its powers in failing to apply the relevant provisions of Indonesian law in determining the amount of AMCO's investment and finding that the revocation of AMCO's investment license was not justified in substance, and (2) failed to state sufficient reasons for its decision in these respects.

In reaching its decision, the committee first addressed certain general questions raised by the parties. With respect to the law governing the relations between the parties, in the absence of a choice of law by the parties, the committee found that the law of Indonesia was applicable.⁵ Relying on the

² ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *done* at Washington, D.C., Mar. 18, 1965, 17 UST 1270, TIAS No. 6090, 575 UNTS 159 [hereinafter cited as ICSID Convention].

³ *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1 (Nov. 21, 1984) (award on the merits), *excerpted in* 24 ILM 1022 (1985). An award on jurisdiction in this matter appears at 23 ILM 351 (1984).

⁴ ICSID Convention, *supra* note 2, Art. 52(1)(b), (d) and (e).

⁵ The committee relied on Article 42 of the ICSID Convention, *supra* note 2, which provides in relevant part:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

decision of another ICSID ad hoc committee,⁶ the drafting history of the ICSID Convention and scholarly writing, the committee noted that an ICSID tribunal is authorized "to apply rules of international law only to fill up *lacunae* in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms."⁷ Upon reviewing the tribunal's decision, the committee found that in reaching its determinations as to the amount of AMCO's investment, the tribunal had failed to apply "fundamental provisions of Indonesian law."⁸ According to the committee, these provisions required the approval and registration of investments in order to qualify under Indonesian investment laws. On this basis, the committee concluded that the tribunal had manifestly exceeded its powers.⁹

Now at issue was the standard of review with respect to the duty of an ICSID tribunal to state reasons for an award. While "a full control and review of the reasoning followed by an ICSID tribunal would transform an annulment proceeding into an ordinary appeal,"¹⁰ the committee found that it had to determine whether the tribunal had given "sufficiently pertinent reasons" for its award.¹¹ The committee concluded that the tribunal had failed to state sufficient reasons for its award because its reasoning with respect to the calculation of AMCO's investment contained somewhat contradictory statements. Since the committee did not consider itself empowered to recalculate the amount of damages, it found that it had to annul the tribunal's damage finding in its entirety, even though the committee agreed that the Indonesian military and police had acted illegally.

In all other respects, the committee rejected Indonesia's pleas for annulment. First, it held that the tribunal had not failed to apply Indonesian law in evaluating the acts of the Indonesian military and police. Second, the committee agreed with the tribunal's decision not to require AMCO to exhaust local remedies since Indonesia was deemed to have waived such a requirement by accepting ICSID jurisdiction without making a reservation to that effect. Third, since the tribunal had applied Indonesian law in reviewing the revocation procedure, the committee did not consider it necessary to review the accuracy of the tribunal's findings on this issue. Finally, the committee rejected Indonesia's claim that the tribunal had seriously departed from a fundamental rule of procedure by not treating the parties

⁶ *Klockner v. Republic of Cameroon*, ICSID Case No. ARB/81/2 (May 3, 1985) (decision annulling award of Oct. 21, 1983), reprinted in 1 FOREIGN INV. L.J. 89 (1986).

⁷ No. ARB/81/1, slip op. at 7-8, para. 20.

⁸ *Id.* at 38, para. 98.

⁹ Had the tribunal addressed AMCO's claim that Indonesia was unjustly enriched by taking over AMCO's investment without paying compensation, there is indication that the committee might have reached a different conclusion. See slip op. at 36, para. 96.

¹⁰ *Id.* at 16, para. 43.

¹¹ *Id.* The committee followed the analysis in *Klockner*, *supra* note 6, at paras. 61 and 117-20, and in Arbitral Award made by the King of Spain on 23 December 1906 (*Hond. v. Nicar.*), 1960 ICJ REP. 192 (Judgment of Nov. 18).

equally in every respect, finding instead that the tribunal had stayed within the scope of its discretionary authority under the ICSID arbitration rules.¹²

With two of five ICSID awards subsequently annulled after extensive, lengthy and expensive proceedings, parties may reconsider whether arbitral proceedings are a more expeditious way of resolving disputes than judicial proceedings. While the availability of procedures to review arbitral awards may strengthen confidence in arbitration under the auspices of ICSID, the two recent annulment decisions reveal inherent flaws in the concept underlying the review provisions of the ICSID Convention. First, as the *Klockner* annulment decision noted, there is "uncertainty" and "obscurity"¹³ involved in distinguishing between errors that justify the annulment of an arbitral award and errors that do not. This is particularly true if the decision to annul turns on fine distinctions between, for example, a failure to apply a rule of law and an error in construing the applicable law as inconsequential, or a failure to state "sufficiently pertinent reasons" and inadequate reasoning. Second, under the ICSID Convention, an ad hoc review committee can only annul an award; it is not empowered to render an award on the merits. Instead, after annulment of an award, if one party so requests, the dispute will be submitted to a new tribunal.¹⁴ It appears desirable to permit either the ad hoc committee or the original tribunal to reconsider the merits of a case, taking into consideration the reasons for the annulment. Either body would appear to be in a position to resolve the dispute in a more efficient and less expensive manner than a new tribunal.

CURRENT DEVELOPMENTS REGARDING JUDICIAL DECISIONS REPORTED IN THE JOURNAL, 1986

- American Cetacean Society v. Baldrige*, 768 F.2d 426, 80 AJIL 352; *rev'd sub nom. Japan Whaling Association v. American Cetacean Society*, 106 S.Ct. 2860.
- Azurin v. Von Raab*, No. 86-0189 (D. Hawaii 1986), 80 AJIL 961; *rev'd*, No. 86-2154 (9th Cir. Oct. 29, 1986).
- British Steel Corp. v. United States*, 605 F.Supp. 286, 80 AJIL 174; *aff'd in part, remanded in part*, 632 F.Supp. 59.
- Demjanjuk v. Petrovsky*, 776 F.2d 571, 80 AJIL 656; *cert. denied*, 106 S.Ct. 1198.
- De Yoreo v. Bell Helicopter Textron, Inc.*, 608 F.Supp. 377, 80 AJIL 179; *aff'd*, 785 F.2d 1282.
- Hohri v. United States*, 782 F.2d 227, 80 AJIL 648; *cert. granted*, 107 S.Ct. 454.
- Randall v. Arabian American Oil Co.*, 778 F.2d 1146, 80 AJIL 651; *rehearing en banc denied*, 782 F.2d 1040.

¹² The committee referred to ICSID Arbitration Rule 34, which provides in relevant part: "The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."

¹³ *Klockner*, *supra* note 6, para. 61.

¹⁴ ICSID Convention, *supra* note 2, Art. 52(6).

CURRENT DEVELOPMENTS

TREATY REVIEW CONFERENCES

A new international forum has emerged in the last decade, with the function of reviewing the implementation of certain arms control agreements. Four agreements, negotiated between 1968 and 1978, provide for the convening of periodic conferences of states parties "to review the operation" of the treaty, including an examination of whether the purposes of the preambles and the provisions of the treaties are being realized.¹ These conferences are completely divorced from the procedures for amendment of the treaties. Instead, they are concerned with the implementation and interpretation of the agreements. Conferences to revise multilateral agreements are rare events probably because of the natural concern that reopening the text of a treaty may cause the entire agreement to unravel. In contrast, conferences to review the operation of treaties have become a common part of the diplomatic environment.² They constitute a new type of enforcement mechanism for international law, though their activities have virtually been ignored in the literature. This neglect may be due to the fact that while the agreements calling for review conferences date from the 1970s, most such conferences have only met in the 1980s.

Originally, the idea of treaty review conferences was linked to the process of revising and amending multilateral treaties. The primary example is Article 109 of the United Nations Charter, which provides for the convening of a "General Conference" of UN members "for the purpose of reviewing the present Charter." Amendments to the Charter adopted by a two-thirds vote of the conference enter into force after ratification by a similar fraction of the UN membership. The first appearance of the review conference idea in a treaty with arms control significance came in the 1959 Antarctic Treaty,³

¹ See Art. VIII, Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 UST 333, TIAS No. 9614 [hereinafter cited as Environmental Modification Convention]; Art. XII, Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 UST 583, TIAS No. 8062 [hereinafter cited as Convention on Biological and Toxin Weapons]; Art. VII, Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 UST 701, TIAS No. 7337 [hereinafter cited as Seabed Arms Control Treaty]; Art. VIII, para. 3, Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 UST 483, TIAS No. 6839, 729 UNTS 161 [hereinafter cited as Nuclear Non-Proliferation Treaty].

² The first review conference on the Environmental Modification Convention met in 1984. The first review conference on the Convention on Biological and Toxin Weapons met in 1980, and the second in 1986. Review conferences on the Seabed Arms Control Treaty met in 1977 and 1983. Review conferences on the Nuclear Non-Proliferation Treaty met in 1975, 1980 and 1985.

³ Antarctic Treaty, Dec. 1, 1959, 12 UST 794, TIAS No. 4780, 402 UNTS 71. Article I prohibits "any measures of a military nature" in Antarctica, including military maneuvers,

Article XII, paragraph 2(a) of which contemplates a conference, 30 years after entry into force, "to review the operation of the treaty." Paragraphs 2(b) and (c) make it clear that this conference may adopt amendments to the Treaty, which will then be submitted to the states parties for ratification. The review conference envisaged by the Antarctic Treaty is therefore more a part of its amendment and revision procedure than an implementation and enforcement mechanism.

The 1968 Nuclear Non-Proliferation Treaty⁴ was the first arms control treaty to divorce the review process from the amendment and revision process. The basic obligation established by the Non-Proliferation Treaty is that non-nuclear-weapons states agree not to receive, manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices. In exchange for undertaking these obligations, the non-nuclear-weapons states wanted to ensure that the nuclear powers engaged in good faith negotiations to lower their own nuclear arsenals, and to guarantee that peaceful nuclear technology was transferred to them. These concerns were addressed during the negotiation of the Treaty, and Articles IV, V and VI were incorporated in its text as a result.⁵ The non-nuclear-weapons states continued to be concerned about how to ensure that the nuclear weapons states would carry out these articles. To meet these concerns, the United States, drawing on the language of the Antarctic Treaty, proposed the calling of a review conference "to review the operation of the Treaty."⁶ The United Kingdom later proposed expanding the scope of review to include examination of whether the "purposes of the Preamble" were being realized in addition to the provisions of the Treaty.⁷ While the Preamble is not, of course, legally binding in itself, some of its paragraphs state in more detail the concerns behind Articles IV, V and VI of the Treaty.⁸

The Non-Proliferation Treaty was negotiated in the Eighteen-Nation Disarmament Committee. Thereafter, through the 1970s, other agreements negotiated in that body and its successors (the Conference of the Committee on Disarmament and the Conference on Disarmament) also included provisions for review conferences closely patterned on those in the Non-Proliferation Treaty.⁹ In each case, the conference is tasked to "review the operation" of the treaty or convention, including consideration of whether the "purposes of the Preamble" are being realized. All call for a review conference 5 years after entry into force, and most envisage subsequent reviews after the first, either at 5-year intervals (and on call of a majority of states

weapons tests, and the establishment of military bases and fortifications. Article V prohibits nuclear explosions in Antarctica.

⁴ See note 1 *supra*.

⁵ *Id.*, Arts. IV, V and VI.

⁶ See 2 M. SHAKER, THE NUCLEAR NON-PROLIFERATION TREATY 872 (1980).

⁷ *Id.* at 873.

⁸ Compare Articles IV, V and VI of the Nuclear Non-Proliferation Treaty, *supra* note 5 and accompanying text, with the paragraphs in the Preamble on peaceful application of nuclear technology, exchange of scientific information, nuclear disarmament, and discontinuance of nuclear tests and the manufacture of nuclear weapons.

⁹ For the relevant treaty provisions, see note 1 *supra*.

parties) or as determined by a decision of the first review conference. In the case of the single agreement that does not expressly provide for conferences following the first, the 1972 Biological and Toxin Weapons Convention, the 1980 Review Conference itself decided that a second conference should be held between 1985 and 1990, at the request of a majority of the states parties.¹⁰ Such a majority did eventually call for a review of the Convention in 1986, and the conference took place from September 8 to 26, 1986.¹¹

Review conferences are not permanent international organizations, served by a full-time secretariat; each conference must be organized on an ad hoc basis. Generally, the precedents established by the first review conference, meeting in 1975 to review the Nuclear Non-Proliferation Treaty, have been followed by later conferences reviewing both that Treaty and the others. One of the earliest phases of the process is to obtain a United Nations General Assembly resolution authorizing the UN Secretariat to provide administrative support for the proposed conference.¹² (Review conferences invariably meet at the UN European headquarters in Geneva, Switzerland.) The parties then arrange for the meeting of a preparatory committee to set dates for the conference, draw up an agenda, draft rules of procedure, recommend a committee structure and nominate a president and other members of the conference bureau. The earliest decisions of the review conference are usually those ratifying the work of the preparatory committee.

None of the treaties calling for review conferences provides any guidance on how the conferences are to reach decisions. (In contrast, conferences empowered to propose amendments or revisions of treaties must usually follow specified decision-making processes.¹³) Each review conference is therefore free to adopt whatever decision-making rules the participating states want to accept, and in the absence of any specified rule, decisions would presumably be by unanimity or consensus. To date, all review conferences have followed the precedent established by the 1975 Non-Proliferation Treaty Review Conference, under which elections and procedural questions are decided by a simple majority of the states present and voting. As to other issues, "every effort should be made to reach agreement on substantive matters by means of consensus." If "all efforts to achieve consensus have been exhausted," then the president of the conference will defer any vote for 48 hours, and if, at the end of that period, there is still no agreement, substantive questions will be decided by a two-thirds majority

¹⁰ The 1980 Final Declaration is published in ARMS CONTROL AND DISARMAMENT AGENCY, 1980 DOCUMENTS ON DISARMAMENT 152, 156.

¹¹ See GA Res. 39/65D, 39 UN GAOR Supp. (No. 51) at 75, UN Doc. A/39/51 (1984). The Preparatory Committee met in Geneva from Apr. 28 to May 2, 1986, and decided that the review conference should meet from Sept. 8 to 26, 1986.

¹² See, e.g., GA Res. 39/65D, *supra* note 11.

¹³ See, e.g., Art. 312, United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, *reprinted in* UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UN Pub. Sales No. E.83.V.5); Art. XII, para. 2(a), Antarctic Treaty, *supra* note 3; UN CHARTER art. 209, para. 2.

vote of those states present and voting.¹⁴ In practice, no review conference has yet resorted to voting on a substantive issue.

This historical emphasis on consensus makes it very unlikely that any review conference would ever condemn a state party for violating a treaty under review. As an enforcement mechanism, the main function of a review conference is to focus public and diplomatic attention periodically on the operation of a particular treaty. Review conferences thus rely on Elihu Root's idea that world opinion is the chief sanction behind compliance with international law.¹⁵

While not required by treaty, most review conferences have adopted final declarations that state, article by article, the conference's conclusions on the operation of the agreement under review. Such declarations are not legally binding in and of themselves, but they may have juridical significance, especially as a source of authoritative interpretations of the treaty. In view of the practice of seeking consensus on all substantive decisions, radical or controversial interpretations are not to be expected from review conferences. These conferences have still played a helpful role in clarifying some ambiguities in the language of the treaties under review. A primary example is the decision, discussed above, of the 1980 Biological and Toxin Weapons Convention Review Conference to call for the convening of a second review conference, thereby construing Article XII of the Convention, which does not mention further conferences, as not prohibiting one.¹⁶ Another example, from the same review conference, involves Article II, which obligates parties to dispose of biological and toxin weapons no later than 9 months after entry into force of the Convention. In its conclusions on this article, the conference made explicit what was probably an implicit condition on this obligation by emphasizing that states implementing Article II "shall observe all necessary safety precautions to protect populations and the environment."¹⁷

The juridical significance of such declarations is suggested by Article 31, paragraph 3 of the Vienna Convention on the Law of Treaties, which lists among the factors to be considered when interpreting treaties: "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."¹⁸ The final declaration of a review conference, especially if adopted by consensus, would probably fit within either or both

¹⁴ See 2 M. SHAKER, *supra* note 6, at 877-78; compare, e.g., Rule 28, Rules of Procedure, Third Review Conference of the Parties to the Treaty on Non-Proliferation of Nuclear Weapons, Doc. NPT/CONF.III/41 (Sept. 9, 1985); and Rule 28, Provisional Rules of Procedure, Review Conference of the Parties to the Biological and Toxin Weapons Convention, Doc. BWC/CONF.I/2 (Jan. 2, 1980).

¹⁵ Root, *The Sanction of International Law*, in *INTERNATIONAL LAW IN THE TWENTIETH CENTURY* 143 (L. Gross ed. 1969).

¹⁶ See note 10 *supra* and accompanying text.

¹⁷ ARMS CONTROL AND DISARMAMENT AGENCY, *supra* note 10, at 153.

¹⁸ Art. 31, para. 3, Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969).

of these categories. Note that the Vienna Convention accords a higher status to subsequent agreements and practice than to negotiating history, which is only considered a "supplementary means of interpretation."¹⁹ Interpretive statements in final declarations may therefore be significant even if they merely reaffirm views already contained in the negotiating history, since that history will thereby be incorporated in state practice or subsequent agreement.

As an institution, the review conference seems to have been mainly a product of the arms control negotiations of the 1970s. The last arms control agreement of that era, the 1980 Convention on Certain Conventional Weapons,²⁰ reverted to an older pattern by making its review conferences part of the revision and amendment process. Similarly, the 1982 Law of the Sea Convention contemplates a "review conference" for the deep seabed regime, but this conference would have the power to propose revisions and amendments to that regime.²¹ For whatever reasons, then, the most recent international agreements have not adopted the review conference as an enforcement mechanism. So long as the multilateral arms control agreements of the 1970s are still viable, however, periodic review conferences are likely to remain an active part of the diplomatic environment.²²

BURRUS M. CARNAHAN*

INTERNATIONAL TRAVEL RESTRICTIONS AND THE AIDS EPIDEMIC

AIDS is truly an international phenomenon, with cases now reported on every continent.¹ To combat the AIDS epidemic, the nations of the world

¹⁹ *Id.*, Art. 32.

²⁰ See Art. 8, para. 2, United Nations Convention on Certain Conventional Weapons, *opened for signature* Apr. 10, 1981, UN Doc. A/CONF.95/15 (1980), *reprinted in* 19 ILM 1523 (1980).

²¹ See Art. 155, Convention on the Law of the Sea, *supra* note 13.

²² Three United Nations agreements on outer space envisage the calling of review conferences, but none has yet been convened on these agreements. See Art. XVIII, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, GA Res. 34/68 (Dec. 5, 1979), *reprinted in* 18 ILM 1434 (1979); Art. X, Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 28 UST 695, TIAS No. 8480; Art. XXVI, Convention on the International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 UST 2389, TIAS No. 7762.

* Lt. Colonel, USAF. The views expressed herein are solely those of the author and do not necessarily represent the opinions of the United States Air Force, the Department of Defense or any other agency of the United States Government.

¹ As of Dec. 31, 1985, there were 17,815 reported cases of AIDS in the Americas. 61 WEEKLY EPIDEMIOLOGICAL REC. 87 (1986) [hereinafter cited as WEEKLY EPIDEM. REC.]. More recently, it was estimated that while approximately 21,000 U.S. residents meet the official criteria for AIDS of the Centers for Disease Control, an additional 100,000 to 200,000 are suffering from AIDS-related complex, and another 1 million to 2 million healthy U.S. residents may be infected with human immunodeficiency virus (HIV). Wall St. J., May 30, 1986, at 25, col. 3. As of Dec. 31, 1985, 2,006 cases of AIDS had been reported in Europe. 61 WEEKLY EPIDEM. REC. at 125. As of Mar. 6, 1986, a status report on AIDS-related activities was available from 21 countries in Africa. Seven countries reported AIDS cases. *Id.* at 93. According to recent estimates by WHO, however, at least 50,000 Africans may have contracted AIDS since 1980, and as many

may be reverting to a pattern of quarantine and restrictions on international travel.² For example, on April 23, 1986, the *Federal Register* gave notice of a rule proposed by the Centers for Disease Control of the United States Public Health Service that, if enacted, will add AIDS to the list of seven diseases that provide grounds for exclusion of aliens.³ This action would allow the U.S. Department of State to deny visas and the Immigration and Naturalization Service to deny admission to aliens subject to medical examination (generally immigrants and refugees) who are found to have AIDS.⁴ Although seemingly innocuous, the proposed regulation was initially seen by gay rights groups as an instrument that could potentially be used to harass homosexuals and other high-risk groups seeking entry to the United States.⁵ The proposed regulation also contrasts with the U.S. Public Health Service's domestic strategy for coping with AIDS, which emphasizes education rather than quarantine as the principal means of controlling the disease.⁶

Claims to restrict travel in order to combat AIDS conflict with the policies of the World Health Organization (WHO). A number of member states recently sought the advice of the WHO on requiring persons seeking to enter their countries to obtain certificates guaranteeing that they were free from AIDS, AIDS-related complex, or HIV (human immuno-deficiency virus) infection. The matter was considered at a meeting of Directors of WHO Collaborating Centers held in Geneva in December 1985. It was determined at this meeting that testing of international travelers and certification were not warranted. Reference was also made to an earlier note in the *Weekly Epidemiological Record* stating:

In accordance with Article 81 of the International Health Regulations (1969), no health document, other than those provided for in the Regulations, shall be required in international traffic; thus it is pointed out that there is no provision for any certificate guaranteeing that a person entering any country or coming from any country is free from a given disease.⁷

as 2 million may be symptomless carriers of the disease. N.Y. Times, June 9, 1986, at A9, col. 6. As of Apr. 29, 1986, 203 cases of AIDS had been reported in Australia. 61 WEEKLY EPIDEM. REC. at 168. As of Oct. 31, 1985, AIDS had been confirmed in 11 males in Japan, including 1 foreigner. *Id.* at 27. The first AIDS case was diagnosed in China (Taiwan) on Jan. 27, 1986. *Id.* at 154.

² For a concise history of the use of quarantine, see Edelman, *International Travel and our National Quarantine System*, 37 TEMP. L.Q. 28, 28-29 (1963). For a history of the AIDS epidemic, see Comment, *AIDS: A Legal Epidemic*, 17 AKRON L. REV. 717 (1984).

³ 51 Fed. Reg. 15,354 (1986) (proposed Apr. 23, 1986).

⁴ *Id.* A spokesman for the Public Health Service indicated that tourists would not generally be required to have a medical examination unless they appeared to be ill. N.Y. Times, Apr. 24, 1986, at A13, col. 1.

⁵ The President of the National Lesbian and Gay Health Organization stated that she was concerned that immigration officers "because of their personal biases and prejudices, might routinely order medical examinations" for homosexuals. N.Y. Times, *supra* note 4, at A13, col. 1.

⁶ See generally *Public Health Service Plan for the Prevention and Control of Acquired Immune Deficiency Syndrome (AIDS)*, 100 PUB. HEALTH REP. 453 (1985).

⁷ 61 WEEKLY EPIDEM. REC. at 27.

Nonetheless, Saudi Arabia and Liberia now require such certificates regarding AIDS from U.S. residents seeking to enter those countries.⁸

In spite of the WHO's efforts to maintain freedom of travel, these developments could presage increased worldwide restrictions on international travel in reaction to the AIDS epidemic, for restrictions now in place could provoke similar countermeasures by other nations. It is thus possible that a new international norm respecting restrictions on international travel may be developing. This paper will review the background of the AIDS epidemic and the approach of the World Health Organization to international health regulation, and propose an international strategy for combating the AIDS epidemic.

The Nature of AIDS

In 1981 the medical community began to notice an increasing incidence of certain unusual infections among members of the male homosexual community in urban centers in the United States. Investigators in New York City and Los Angeles noted the unusually frequent occurrence of Kaposi's sarcoma and pneumocystitis carinii among sexually active homosexuals.⁹ Subsequently, it became clear that these infections were associated with suppression of the T4 lymphocyte. The Centers for Disease Control (CDC) named the disorder Acquired Immune Deficiency Syndrome (AIDS) in recognition of its transmission to previously healthy individuals.¹⁰ Since 1981, AIDS has also been diagnosed with increasing frequency in intravenous drug abusers,¹¹ hemophiliacs,¹² Haitians¹³ and children.¹⁴

Reporting of the disease is particularly problematic in developing nations. Some countries lack the diagnostic resources, while others are reluctant to disclose the true extent of the disease for fear of hurting their tourism industry or admitting the existence of certain underlying social problems. Thus, the disease has probably been seriously underreported in developing nations.

The WHO has now adopted the CDC definition of AIDS for application in countries where appropriate diagnostic techniques are available. It specifies that AIDS is an illness characterized by certain opportunistic diseases evi-

⁸ Interview with Dr. H. M. Ginzburg, Director, AIDS Project, National Institute of Allergies and Infectious Diseases, NIH (Aug. 19, 1986).

⁹ *Special Report: Epidemiological Aspects of the Current Outbreak of Kaposi's Sarcoma and Opportunistic Infections*, 306 N. ENG. J. MED. 248 (1981).

¹⁰ Kornfeld, Stouwe, Lange, Reddy & Grieco, *T-Lymphocyte Subpopulations in Homosexual Men*, 307 N. ENG. J. MED. 729 (1982).

¹¹ See, e.g., *Prevalence of HTLV-III Infection among New Haven, Connecticut, Parenteral Drug Abusers in 1982-1983*, 314 N. ENG. J. MED. 117 (1986).

¹² See, e.g., Evatt, Gomperts, McDougal & Ramsey, *Medical Intelligence: Coincidental Appearance of LAV/HTLV-III Antibodies in Hemophiliacs and the Onset of the AIDS Epidemic*, 312 N. ENG. J. MED. 483 (1985).

¹³ See, e.g., Pape, Liautaud, Thomas, et al., *Characteristics of the Acquired Immunodeficiency Syndrome (AIDS) in Haiti*, 309 N. ENG. J. MED. 945 (1983).

¹⁴ See generally Curran, Morgan, Hardy, Jaffe, Darrow & Dowdle, *The Epidemiology of AIDS: Current Status and Future Prospects*, 229 SCIENCE 1352 (1985).

dencing underlying cellular immunodeficiency, and the absence of all other known causes of the immunodeficiency.¹⁵ A provisional clinical case definition of AIDS was also developed by the WHO for use in countries where diagnostic resources are limited. It defines AIDS in adults as characterized by the existence of two major signs (i.e., weight loss greater than 10 percent of body weight, chronic diarrhea for more than a month, or prolonged fever for more than a month), associated with at least one minor sign (e.g., persistent cough for more than a month, generalized pruritic dermatitis, recurrent herpes zoster, oro-pharyngeal candidiasis, chronic progressive and disseminated herpes simplex infection or generalized lymphadenopathy), and the absence of other known causes of immunosuppression. The presence of either Kaposi's sarcoma or cryptococcal meningitis is sufficient in itself for a diagnosis of AIDS.¹⁶

In 1983–1984, investigators in France and the United States isolated a virus from patients with AIDS. The French scientists named the virus lymphadenopathy-associated virus (LAV),¹⁷ while the U.S. investigators designated it as Human T-Cell Lymphotropic Virus Type-III (HTLV-III).¹⁸ HIV (human immunodeficiency virus) is now the common international designation and will be used in this paper.

A disturbing characteristic of HIV is its propensity for phenotypic variability as it migrates among individuals. This makes development of an effective vaccine more difficult "because antibody produced in response to protein from a particular virus strain may not effectively protect against genetic variants."¹⁹ Recently, however, scientists have suggested that advances in genetic engineering may accelerate progress towards an AIDS vaccine by permitting effective modification of the smallpox vaccine for use against AIDS.²⁰

International Travel Restrictions and WHO

International cooperation in the field of health can be traced back to the mid-19th century. The expansion of international travel in the early 19th century due to improvements in transportation brought about a spread of epidemic diseases. The first international sanitary convention was held in Paris in 1851 in an attempt to combat the spread of cholera, plague and yellow fever. Eventually, several agencies were created to effectuate an international approach to epidemic diseases: the Office International d'Hygiène Publique; the Health Organization of the League of Nations; and the Pan-

¹⁵ 61 WEEKLY EPIDEM. REC. at 69; see also *Special Report: The AIDS Epidemic*, 312 N. ENG. J. MED. 521, 522 (1985).

¹⁶ 61 WEEKLY EPIDEM. REC. at 72.

¹⁷ Laurence, Brun-Vizenet, et al., *Lymphadenopathy-Associated Viral Antibody in AIDS*, 311 N. ENG. J. MED. 1269 (1984).

¹⁸ Broder & Gallo, *A Pathogenic Retrovirus (HTLV-III) Linked to AIDS*, *id.* at 1292.

¹⁹ Wong-Staal, Shaw, Hahn, et al., *Genomic Diversity of Human T-Lymphotropic Virus Type III (HTLV-III)*, 229 SCIENCE 759 (1985).

²⁰ N.Y. Times, Apr. 13, 1986, §4, at 1, col. 1.

American Sanitary Organization.²¹ As early as 1866, an international body expressed the notion that "it is preferable to limit a disease at its source rather than to attempt to stop an epidemic once started."²² After World War I, the President of the Permanent Committee of the Office International suggested that the notion of quarantine be abandoned and instead advocated the further development of national health services and education of the public.²³

The World Health Organization was established in the aftermath of World War II as a specialized agency of the United Nations. The major policy-making body of the WHO is the World Health Assembly, which meets annually and is composed of delegates from the member nations.²⁴ The WHO Constitution authorizes the Health Assembly to adopt sanitary and quarantine requirements.²⁵ Regulations adopted by the assembly are effective for all member nations unless a member nation notifies the Director-General of rejection within a given time.²⁶ Under this authority, the WHO adopted the International Health Regulations (formerly International Sanitary Regulations), which provide maximum quarantine actions member nations adhering to the regulations may take with respect to four diseases: cholera, plague, yellow fever and smallpox.²⁷ The regulations do not purport to cover diseases other than these four, but arguably they establish maximum measures restrictive of international traffic that member nations may take with respect to controlling the spread of other epidemic diseases.²⁸ The regulations also impose certain affirmative obligations, e.g., notification to the WHO of outbreaks of the diseases covered.²⁹ The essential aim of these regulations "is to ensure the maximum security against the international spread of diseases with the minimum interference with world traffic."³⁰ Thus, emphasis on quarantine—i.e., the erection of entry barriers by each nation—has been diminishing in favor of increased reliance on epidemiological surveillance and the improvement of basic health services in member nations.

WHO officials have expressed concern over health control procedures that interfere with international traffic. "All such measures have repercussions on trade and economic conditions generally, while many reflect adversely on administrative, or even political, relationships."³¹ Every health control measure must be balanced against the disruption it will cause international traffic and trade. Moreover, even rigid quarantine measures cannot achieve complete security against the spread of disease: "Excessive measures

²¹ For a concise history of international cooperation in health matters, see Gutteridge, *The World Health Organization: Its Scope and Achievements*, 37 TEMP. L.Q. 1 (1963).

²² *Id.* at 2.

²³ *Id.*

²⁴ WHO CONST. art. 18(a).

²⁵ *Id.*, art. 21(a).

²⁶ *Id.*, art. 22.

²⁷ See generally P. DELON, *THE INTERNATIONAL HEALTH REGULATIONS: A PRACTICAL GUIDE* (1975).

²⁸ *Id.* at 13.

²⁹ *Id.* at 10-11.

³⁰ *Id.* at 7.

³¹ Director-General, Explanatory Memorandum, WHO Official Records, No. 37, 1951, at 330, quoted in 1 D. LEIVE, *INTERNATIONAL REGULATORY REGIMES* 3 (1976).

foster evasive methods, give a false sense of security and frequently result in retaliation."³² Overly restrictive measures also militate against national interests because the free flow of international traffic is an important factor in economic development.³³

On the other hand, since AIDS is invariably fatal, the policy favoring free movement of peoples may have to bow to the necessities of controlling the further spread of the disease. It may be time for the WHO to reexamine the potential role of international travel restrictions and quarantine in containing AIDS. It is an insidious disease that has taken advantage of changes in sexual mores as well as the ease of international travel, and the measures taken thus far to contain it have proved ineffective.

Conclusion

Under certain circumstances, increasing barriers to international travel may be an appropriate means of dealing with the AIDS epidemic. To be effective, however, it must be accompanied by an international educational campaign and increased assistance to developing nations for coping with the disease. Although AIDS is apparently not spread by casual contact, since its primary modes of transmission are sexual contact and the use of contaminated needles by intravenous drug abusers, there may be justification for some limited restrictions on international travel to combat it. Undoubtedly, vacationers who use travel as an opportunity for sexual adventure are logical targets for scrutiny. Recently, Brazilian health authorities distributed questionnaires asking visitors to the annual Carnival in Rio de Janeiro to answer questions about their sexual preferences and contacts with AIDS. While some airlines cooperated in handing out the questionnaires, others refused to for fear of alarming their customers. The officials were seeking to test their hypothesis that the Carnival is an occasion when the disease is likely to enter Brazil. One official stated: "Carnival is a time of casual sex, and we know that among homosexuals the number of encounters is very, very high."³⁴ Certainly, this sort of behavior is dangerous in the present circumstances.

In parts of North America and Europe, the sharing of contaminated needles among drug addicts is a substantial risk factor. Reduction of this risk of spreading HIV may include international efforts to counsel and educate addicts, as well as restrictions on the travel of addicts. In some instances, the provision of low-cost or free needles could also assist in controlling the disease.³⁵ The use of unsterile needles in medical facilities may also play a role in the transmission of the disease in tropical countries. Local health authorities should make it known that effective sterilization of needles is vital in combating the spread of AIDS.³⁶

³² *Id.*

³³ 1 D. LEIVE, *supra* note 31, at 3.

³⁴ N.Y. Times, Feb. 9, 1986, §1, at 9, col. 1.

³⁵ *Free Needles for Intravenous Drug Users at Risk for AIDS: Current Developments in New York City*, 313 N. ENG. J. MED. 1476 (1985).

³⁶ *Report of a WHO Meeting on AIDS*, 32 INT'L NURSING REV. 80 (1985).

Restrictions on persons seeking to travel to and from countries where HIV infection is especially common might assist in controlling the further spread of the disease. In some Central African nations, as much as 50 percent of the population may be infected with HIV.³⁷ The public health services in these nations are in danger of being overwhelmed. Recently, a plan for AIDS control in the African Region of WHO was unanimously approved by delegates from the 41 member nations. Member states were urged to undertake the following: (1) an initial assessment of the AIDS situation in their countries, including an evaluation of their resources for dealing with it; (2) the strengthening of their health infrastructures so as to support AIDS-prevention activities; (3) educational programs on the prevention of AIDS directed to both the general public and high-risk groups; and (4) an exchange of information with the other member nations on AIDS.³⁸ Naturally, the adequate development of these programs will require significant assistance from developed nations.³⁹

LEONARD J. NELSON III*

STATE DEPARTMENT APPOINTS ADVISORY COMMITTEE ON
INTERNATIONAL LAW

The Department of State has revived its former practice of constituting an Advisory Committee on International Law. Appointed by the Legal Adviser, Abraham D. Sofaer, the committee is intended to provide the Department with a means of obtaining the advice and views of the United States legal profession on questions of public international law.

The committee met for the first time on October 6, 1986. The Department contemplates holding three or four such meetings a year, which will be announced in the *Federal Register*. The members of the committee are: John R. Stevenson (Chairman), Marshall J. Breger, Warren Christopher, Lloyd N. Cutler, Lori F. Damrosch, Kenneth Dam, Thomas M. Franck, Richard Gardner, Rita E. Hauser, Keith Highet, Monroe Leigh, John Norton Moore, Fred L. Morrison, Bernard H. Oxman, W. Michael Reisman, Seymour J. Rubin, Eugene C. Thomas, Harold R. Tyler, Jr., Detlev F. Vagts and Edwin J. Wesely.

³⁷ Remarks of Professor Luc Montagnier, Pasteur Institute, at a conference at the Sydney Westmead Hospital, Sydney Morning Herald, Aug. 16, 1986, at 3, col. 1.

³⁸ 61 WEEKLY EPIDEM. REC. at 93.

³⁹ The U.S. Agency for International Development recently announced that it will give the WHO \$2 million in the current fiscal year to help combat AIDS worldwide. N.Y. Times, June 16, 1986, at A10, col. 6.

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BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

REVIEW ARTICLE

NONAPPEARANCE AND DISAPPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE

Non-Appearance before the International Court of Justice: Functional and Comparative Analysis. By Jerome B. Elkind. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1984. Pp. xiv, 233. Indexes. Dfl.110; \$42; £27.95.

Non-appearance before the International Court of Justice. By H. W. A. Thirlway. New York and London: Cambridge University Press, 1985. Pp. 184. Index. \$49.50.

"I wish you wouldn't keep appearing and vanishing so suddenly: you make one feel quite giddy!"

"All right," said the Cat; and this time it vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.

"Well! I've often seen a cat without a grin," thought Alice; "but a grin without a cat! It's the most curious thing I ever saw in all my life!"¹

One of the worst things that can befall a scholar is to have a book published on a specialized subject and, within months of its publication, to find that another book has been published in another part of the world on precisely the same subject. It is even worse if the names of the books are identical, as is the case here. Another occupational pitfall is to see publication of a substantial scholarly work on a specialized subject on the very eve of a sudden critical development in the field, which may, or may not, set doubts to rest and clarify ambiguities treated at length in that work.

Both catastrophes have befallen Jerome Elkind and Hugh Thirlway, authors of two quite different books that appeared within months of one another on the subject of nonappearance in the International Court. Both works were published within months of the Judgment in the 1984 jurisdictional phase of the *Nicaragua* case² and, obviously, before the hearing on the merits³ and the extraordinary (and quite unprecedented) efforts of the

¹ L. CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* 74-75 (1867).

² Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26).

³ Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 ICJ REP. 14 (Judgment of June 27) [hereinafter cited as *Nicaragua Merits*].

Court under Article 53⁴ in that proceeding.⁵ My sympathies, therefore, to both Professor Elkind and Dr. Thirlway on the predicament into which they have inadvertently tumbled. In view of the other developments described below, however, it is possible that at least one of these works may see republication in substantially expanded form.⁶

The question of nonappearance before the International Court of Justice is a fundamental problem, with which Article 53 of the Statute is intended to deal.⁷ There has only been one major book on the subject, in 1960,⁸ and that has now been thoroughly overtaken by the popularity, since 1970, of what Sir Gerald Fitzmaurice has termed the "no-appearance technique" in litigation before the Court.⁹ In the words of Thirlway, this "has become the almost invariable practice of respondents" (p. 163) since the early 1970s—in cases, of course, that have been brought by application under either Article 36(1) or under Article 36(2), and not by *compromis* or special agreement, where in principle the involuntariness of the proceeding is not at issue.

⁴ Article 53 of the Statute provides that:

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

⁵ The problem is further compounded by the fact that—apparently—these two works were originally in concurrence in another way; it is this reviewer's understanding that the Thirlway book was intended (but was not submitted in time) for consideration by the Institut de Droit International for its award as prize book for 1985, and that the book by Elkind was submitted in time (and did, in fact, receive the award, the James Brown Scott prize: see Elkind at ix-xi; Thirlway at vii).

⁶ A word should be added concerning the somewhat delayed timing of the present joint book review, which was held until after the Court's Judgment in the *Nicaragua* case became available and the handling of Article 53 by that Judgment could be assessed in conjunction with the books, so that their value as permanent contributions to international law scholarship could be addressed as completely as possible.

⁷ See note 4 *supra*.

⁸ G. GUYOMAR, *LE DÉFAUT DES PARTIES À UN DIFFÉREND DEVANT LES JURIDICTIONS INTERNATIONALES* (1960).

⁹ See Fitzmaurice, *The Problem of the 'Non-Appearing' Defendant Government*, 51 BRIT. Y.B. INT'L L. 89, 105 (1980), cited in Thirlway at 154:

The non-appearance technique is aimed at exactly the same result, namely to reduce to a purely voluntary act what was undertaken as obligatory (or ostensibly so); and it achieved this in so far as it enables—or seems to enable—the non-appearing State to maintain that it is a stranger to the proceedings and to their outcome.

The discussion here concerns a provocative idea suggested by Fitzmaurice (to whom Thirlway's book is dedicated), which, in Thirlway's words, is "a parallel between the non-appearance technique and the use of automatic reservations of the so-called 'Connally' type in acceptance of a jurisdiction under the optional clause" (Thirlway, p. 154). See also Sinclair, *Some Procedural Aspects of Recent International Litigation*, 30 INT'L & COMP. L.Q. 338 (1981); and T. O. ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS* 33-66 (ch. 2, "The International Court of Justice and the non-appearing respondent") (1983).

A fundamental element of the system of international adjudication, of which the International Court has long been the capstone, is that members of the United Nations and parties to the Statute have agreed in advance that they will respect judgments of the Court in cases to which they are parties.¹⁰ This commitment is quite separate and independent from any specific consent to the Court's *jurisdiction*. It also contradicts, at least on a plane of legal principle, what is commonly regarded by municipal lawyers as being a "lack of enforcement power" in the International Court.¹¹ Yet how can this be squared with the "no-appearance technique," by which a respondent state, denying that it has given consent to the Court's exercise of jurisdiction in a given matter, boycotts the proceedings and remains aloof from the hearings? Almost invariably it also submits documents and comments on jurisdiction, the conduct of the case and the existence of certain facts in irregular communications with the Court, the Registry and the world at large.¹²

Indeed, this is precisely what the United States has so lamentably done in the merits phase of the *Nicaragua* case.¹³ Yet—as in *Nicaragua*—if the

¹⁰ Art. 94, para. 1 of the Charter and Arts. 59 and 60 of the Statute. See comments by this reviewer in *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79 AJIL 992, 1000 (1985).

¹¹ This is in spite of the provisions of Article 94, paragraph 2 of the Charter, which have never been used (as such) in the history of the Organization. The argument, of course, runs that if the will of the Security Council cannot be expressed, by reason of a veto of a permanent member or otherwise, then there will not be any binding enforcement measures under Article 94; this lack of certainty therefore constitutes a flaw in the system and the judgments of the Court have no real weight. The obvious response to this argument is: "Compared with *what* do the judgments lack weight?" Another obvious response is that the consensual predicates for the binding effect of judgments of the Court are present in customary international law as well as in the Charter and the Statute, and that even though the binding quality of such judgments may not always be capable of being given *effect*, it still exists as a matter of law, and moreover, it exists to a greater degree of certainty than any alternative system yet devised or previously experienced. In a nutshell, a decision such as that in the *Nicaragua* case will not go away, can only be revised or amended in accordance with the terms of the Statute and has a substantive content quite separate and distinct from its procedural effectiveness.

¹² See *Nicaragua Merits*, 1986 ICJ REP. at 25, para. 31:

[T]he experience of previous cases in which one party has decided not to appear shows that something more is involved. Though formally absent from the proceedings, the party in question frequently submits to the Court letters and documents, in ways and by means not contemplated by the Rules. The Court has thus to strike a balance. On the one hand, it is valuable for the Court to know the views of both parties in whatever form those views may have been expressed. . . . On the other hand, the Court has to emphasize that the equality of the parties to the dispute must remain the basic principle for the Court. . . . [T]herefore the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage.

Judge Schwebel, in his dissenting opinion, stated that "the practice of the Court demonstrates repeated reliance on irregular communications from States parties to a case and reliance even on documents and statements of a non-appearing State which are not addressed to the Court and which are published after the closure of oral hearings." *Id.* at 318, para. 123. (Thirlway considers this problem in depth at pp. 143–51.)

¹³ The United States publication was not submitted to the Court in any formal manner contemplated by the Statute and Rules of Court, though on 13 September 1985 the

Court finds that it possesses jurisdiction, there can be no question but that the nonappearing respondent state will be bound by the judgment of the Court,¹⁴ will be a "party" to the proceedings no matter what¹⁵ and, as such, will be bound to comply with the decision.¹⁶ This series of propositions, and even the eventuality that the United States will somehow avoid and repudiate the *Nicaragua* decision, is contemplated by the *Nicaragua* Judgment itself, where the Court went so far as to comment on the "reservation of rights" by the United States¹⁷ that

[t]he fact that a State purports to "reserve its rights" in respect of a future decision of the Court, after the Court has determined that it has jurisdiction, is clearly of no effect on the validity of that decision. Under Article 36, paragraph 6, of its Statute, the Court has jurisdiction to determine any dispute as to its own jurisdiction, and its judgment on that matter, as on the merits, is final and binding on the parties under Articles 59 and 60 of the Statute (cf. *Corfu Channel, Judgment of 15 December 1949, I.C.J. Reports 1949*, p. 248).¹⁸

Thirlway identifies the problem as one where a state both is party to proceedings and is somehow standing outside them (p. 153). He writes:

Absence from the proceedings makes possible a subsequent stand which makes subtle play with a juxtaposition of two ideas. In the first place, there is the argument that the Court legally was without jurisdiction, and that the question whether its decision on the merits was

United States Information Office in The Hague sent copies to an official of the Registry to be made available to anyone at the Court interested in the subject.

Id. at 44, para. 73. The oral proceedings had begun on the day before (Sept. 12). The publication was later circulated as an official document of the United Nations. *Id.*

¹⁴ "[T]he Court is bound to emphasize that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. *Nor does such validity depend upon the acceptance of that judgment by one party.*" *Id.* at 23, para. 27 (italics added).

¹⁵

A State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; *the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute.*

Id. at 24, para. 28 (italics added).

¹⁶ *Id.* The United States is a "party" to a decision that says that the United States is party to that decision. A nice question is suggested by the fact that the paragraph cited from *Nicaragua* specifically "held" that *the nonappearing party would remain a party*. It is *res judicata* as to the United States, on just that point; even though it did not form part of the *dispositif*, it is an essential element of the decision. (Moreover, the matter is made crystal clear by the provisions of the Charter, Art. 94, para. 1, and the Statute, Art. 36, para. 6, and Arts. 59 and 60.)

¹⁷ *Id.* at 23-24, paras. 26-27. See Department of State, Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, reprinted in 24 ILM 246 (1985), and in large part in 79 AJIL 439 (1985); the statement was supported by Observations on the International Court of Justice's November 26, 1984 Judgment on Jurisdiction and Admissibility in the Case of *Nicaragua v. United States of America*, 24 ILM 249 (1985) and 79 AJIL 423 (1985); see material cited in note 41 *infra*.

¹⁸ 1986 ICJ REP. at 23-24, para. 27.

sound in law is therefore one which simply does not arise. Secondly, there is the implication that the (allegedly justified) absence from the proceedings of the State concerned means that the decision was taken without the benefit of its arguments, and was as a result both procedurally unworthy of respect and substantively erroneous [p. 155].

One hopes that the United States will not adopt a public position embracing the second "implication" emphasized in the quotation, but such a hope will doubtless be dashed by the need of the administration to protect its 1985 decision not to participate further in the case.

In sum, then: nonappearance, and all that goes with it, has now become an unhealthily prevalent attitude of respondents before the Court. The matter raises some profound questions concerning the role and powers of the Court. It is to these questions that these two books are addressed.

The basic organization of Elkind's book is annoying. It does not show much imagination and, worst of all, appears to grant short shrift to the intricacies and implications of the nonappearance problem in the Court at the price of what appears to be an irritatingly irrelevant and disconnected series of expository chapters on other subjects that are more or less related to nonappearance. Of the total of just over 200 pages, the first 30 are taken up with a study of "default" in municipal law. By the time one reaches nonappearance, one has been subjected to a plethora of detail of dubious relevance—or at least of a relevance that is not established. This could be classified as a drafting error of considerable magnitude: *contrast* the more direct and dramatic approach adopted by Thirlway.¹⁹

The second chapter embarks on a case-by-case review of the 12 cases considered as involving nonappearance before the old Court and the new. This takes up 48 pages and is an excellent summary. It would have been far better, however, if the problem had been stated firmly and attractively up front, and then followed by the cases—and had the cases so set forth reflected aspects of the problem as they went along. It is not until the third chapter, " 'Default' before the International Court of Justice," that the author gets down to the heart of the matter (and then in a relatively pedestrian study of only 22 pages). The next two chapters are on related, but not directly relevant, matters: interim protection and self-judging reservations (the discussion of which consumes almost 70 pages, or one-third of the book).²⁰

One of the problems that the author faced was integrating this related material into the mainstream of his book without interfering with the development of the central argument. Regrettably, he did not succeed; it seems as if the chapters on these subjects are quasi-independent pieces that have been dropped into an intricate discussion with insufficient work to relate them to the main course of the book. Because of the division of the book

¹⁹ Indeed, Thirlway does not reach the comparative material in any significant sense until late in his study, and does so in the context of *forum prorogatum* as being at the heart of the problem: see Thirlway at 155–57.

²⁰ It should be noted here that Elkind was in fact the author of an entire book on the subject of interim protection. J. B. ELKIND, *INTERIM PROTECTION: A FUNCTIONAL APPROACH* (1981); see Elkind at 105 n.6, and comment in author's preface at xiv.

into six semi-autonomous chapters, and the lack of an obvious common thread between them, one receives the unavoidable impression that the author has written a series of excellent lecture notes, added case abstracts and summaries, and tacked the parts together. If rewritten with concentration, detail, a good editor and a proper introduction and conclusion, this would have been a fair book, if not a good one.²¹

The sixth and last chapter is the most interesting. It deals with the generic problem of "The Willingness of States to Submit to Jurisdiction." Elkind states the problem succinctly: "Failure to appear and failure to accept the compulsory jurisdiction of the Court are both aspects of the same problem, a refusal to accept the principle of third-party settlement of disputes" (p. 187). The chapter ranges far and wide, and canvasses the views of the late Judges Sir Hersch Lauterpacht and Philip C. Jessup (to the latter of whom the book is dedicated) and of Professor Leo Gross, relating respectively to the powers of the Court in situations of nonappearance, and improvements that have long been suggested for tightening up its authority and usefulness.²² The book also verges, periodically, on an oversimplistic analysis of a highly complex problem. Possibly, the author's style and format have almost automatically prevented him from carrying discussions to the requisite degree of detail. The paragraphs are short and somewhat choppy; the statements are curt and conclusory. Throughout, one has the feeling that the exposition and development are summary: every few pages the reader pauses, to wish that two or three paragraphs of closely reasoned argument had been attached to a point that is made almost *en passant*.

One small, but striking, example is at the end of a relatively interesting chapter on "Three Kinds of Self Judgment," in which Elkind has canvassed the history of the subject in the Court and touched on several possible conclusions that are most interesting, but that are, as it were, left hanging. He writes:

It would seem that, where a State, which has filed a declaration under Article 36(2), refuses to appear on the ground that the Court has no jurisdiction, the Court would be justified in concluding that it has not really accepted the compulsory jurisdiction of the Court and in holding the declaration to be a nullity. In this situation, Eisemann's reasoning is probably correct. *The declaration can only be considered a*

²¹ Although bedeviled by distracting typographical errors, and sometimes even words that must have been totally dropped by the printer, the form of the book is commendable. Footnotes are where they should be: at the foot of the page. Admittedly, there are far too many cross-references to other parts of the book that refer to chapter and footnote, rather than to page. However, there is an extensive bibliography, a table of cases, a name index and a subject index. By contrast, Thirlway has only a brief bibliography and table of cases, and an irritatingly incomplete and sketchy index.

²² However, the chapter reads as if it were a half-polished first draft rather than a completed whole; the author plunges from discussing one author or topic to another without seeming to pause for breath, and without relating the first to the second. Not only is it tiring; it also gives the impression that this chapter was written in a hurry and without thoughtful revision. Unfortunately, this is the overall impression given by the book as a whole. See, e.g., the very last paragraph of the book, *quoted in this review at p. 248*.

nullity if the respondent State continues to refuse to appear once the Court has held that it possesses jurisdiction. If a State were subsequently to decide to renew its declaration, we might assume that it would then be willing to comply with the Statute, with whatever judgment the Court has given and with Article 94 of the United Nations Charter [p. 170, italics added].

This paragraph could be seen as being apposite to the situation that developed subsequently in the *Nicaragua* case. But what could possibly support the boldness of his conclusion, and the almost offhand treatment of such an important question? If Elkind's "it would seem" is justified, then all a respondent state ever has to do is to remain outside the proceedings (if necessary, after a preliminary judgment on jurisdiction) and its declaration of acceptance will be a "nullity." Would this not be equally acceptable, on a parity of reasoning, to compromissory clauses in treaties? Surely such a proposition is an absurdity: it effectively does away with the entire concept of *pacta sunt servanda*. Any jurisdictional clause could be deemed to be a "nullity" by any action of a state that might subsequently be inconsistent with according that clause full force and effect. Thus, if the United States (as anticipated by most observers) now continues to assert that the Court manifestly exceeded its jurisdiction in the *Nicaragua* case, would this mean that its (then effective) optional clause declaration—for what it was worth—was really no more than a "nullity" from the beginning? If it *was* a nullity, then did the Court not inescapably blunder in retrospect, and, in fact, manifestly exceed its jurisdiction? Yet, if there were no jurisdiction *ab initio* and in retrospect, how could the Court have possessed the jurisdiction to exceed its jurisdiction?²³

Where are we in all this? Worse, where is international law? Why is there any relevance—as suggested in the last sentence of the quotation above—in the suggestion that the state in question "would then be *willing to comply* with the Statute, with whatever judgment the Court has given and with Article 94 of the United Nations Charter" (italics added)? What does "*willingness to comply*" have to do with an *obligation to comply* with the Statute and, above all, the Charter? How could there be any doubt that a member of the United Nations is bound by the Statute of the Court, which is an integral part of the Charter, or by the Charter itself, as long as it remains a member?²⁴ There is no explanation or elaboration of this critically important and fascinating point—one which, in many ways, has been brought to the forefront by the *Nicaragua* case.

In conclusion, Elkind would have produced a far more useful book if he had taken more time. He is obviously a perceptive scholar with a broad and energetic approach, yet this work gives the impression not of a whole, but

²³ This way lies madness: from the *compétence de la compétence* we have derived the *incompétence de l'incompétence*: no doubt a new and threatening (and equally circular) concept.

²⁴ This point, of course, goes beyond the immediate point under discussion in Elkind, namely, at what point might the *declaration of adherence* to the jurisdiction of the Court under Article 36, paragraph 2, be considered a "nullity"; but it is a point that is indeed raised by the context of the discussion.

of a collection of six parts. The reader has the impression from time to time that the chapter he is reading is an independent study, and it is hard to keep the central problem in mind as one proceeds. The author goes from one point to the next; deals with authorities in a catalog; makes general statements; and plows forward. More detail would have been more useful, and would have informed the discussion rather than hindered it; as it is, the reader has the sense that this intricate subject was being dealt with in a hurried manner, as if to meet a deadline.

The deadline relating to the competition on this subject sponsored by the Institut de Droit International was a deadline that Thirlway obviously did not meet. In a sense the book is all the better for it. Thirlway's method of setting forth his subject is far more conducive to reflective reading than is Elkind's.²⁵ Moreover, although his exposition of the precedents is not as routine and complete as the concatenation of abstracts put together by Elkind, Thirlway's description of each case is naturally more keyed to the position occupied by it in relation to the problem as a whole. Instead of the rambling preamble that is presented by Elkind, he gives us at the outset a statement of the problem.

Since Thirlway is a lawyer employed on the staff of the Court's Registry, he brings to this subject a particularly useful combination of skills and experience. Intimately familiar with the Court's procedures and the give-and-take and intricate nuances that so often accompany litigation before the Court, he is able to view the problem from the inside. He is a proceduralist. It is the procedural difficulties of Article 53's application that very much challenge the Court: how can it be expected to handle the difficult problems presented by nonappearance and apply the provisions of Article 53? One who is familiar with the point of view of the judges at next to firsthand will inevitably possess an extraordinary advantage over an outsider in perceiving the nuances of the problem.

Thus, Thirlway is fascinated by the procedural ramifications of nonappearance: the apparent duty of the Court to answer arguments not really made and meet objections not really raised, and the propriety and niceties of the Court's taking into account jurisdictional objections and arguments that have come before it by unorthodox or extrajudicial means; the burden that a phantom opponent with invisible arguments necessarily places upon the appearing party; and the corresponding effect on the form and substance of the latter's pleadings. Thirlway deals at considerable length and in two reprises (chs. 7 and 8, each entitled "Procedure on non-appearance" [Parts 1 and 2]) with the procedural ramifications of nonappearance; how the difficulties confronted by the Court and by the appearing party can be met; and how the use of the "no-appearance" technique can properly be viewed

²⁵ His book is structured around the actual problem: his 179 pages are divided into 11 short chapters: "The phenomenon"; "The text"; "The concept"; "Is a non-appearing State a 'party' to proceedings?"; "Is there a duty to appear in ICJ proceedings?"; "Non-appearance and indication of provisional measures"; "Procedure on non-appearance" (Parts 1 and 2); "Attitudes concomitant with non-appearance"; "Diagnoses and remedies"; and "Conclusions." It is a logical breakdown.

as adding—immensely—to the Court's burden. Thirlway takes this problem and examines it, facet by facet, commencing with the basic analysis that the threshold purpose of Article 53 was to prevent nonappearance from being treated as an implied admission (pp. 128–29).

The treatment of the procedural difficulties sets in motion a form of invisible dialogue with two highly visible and distinguished late members of what Oscar Schachter has elegantly described as "the invisible college of international lawyers," the late Judge Sir Gerald Fitzmaurice and the late Professor D. P. O'Connell. The stage is set by O'Connell's brilliant oral pleading in the *Aegean Sea Continental Shelf* case,²⁶ which is quoted by the author and which describes the quandary in which opposing counsel is necessarily placed by the nonappearance of a respondent state—a quandary that can be seen as being no less in pain and suffering than the quandary in which the Court finds itself.²⁷ Indeed, O'Connell suggested that irregular communications by a party that has not appeared give the present party an unfair burden of "negative proof": "Not only does the applicant have the initial burden of proof, it has now thrust upon it the whole burden of proof, including a burden of negative proof."²⁸ It is an interesting point.²⁹

The quandary also assumes the lineaments of a dilemma, as it requires both counsel and the Court to choose between two equally uninviting alternatives: one being merely to identify the various arguments that could have been advanced by the absentee; the other being to elaborate them and treat them as completely as possible, even if they might not in fact have been made at all. In a curious sense the dilemma goes even further: fully to canvass the positions of an absent party under Article 53 might be seen as including the duty to exercise the greatest possible skill and imagination in formulating those positions. When this job is effectively done by the Court, it must surely result in the absent respondent's case being made more effectively than it could have been made if the respondent had actually appeared and been left to the mercies of its own counsel.

At the heart of the invisible dialogue with Fitzmaurice³⁰ is the proposition that Fitzmaurice's disapproval of the "no-appearance technique" may have

²⁶ *Aegean Sea Continental Shelf* (Greece v. Turk.), Interim Protection, 1976 ICJ REP. 3 (Order of Sept. 11), and 1978 ICJ REP. 3 (Judgment of Dec. 19).

²⁷ "In the *locus classicus* for criticism of the non-appearing respondent State, the argument of Professor O'Connell in the *Aegean Sea* case, it is argued that the failure to appear and present its arguments put both the Court and the applicant party in an embarrassing position" (Thirlway, p. 140).

²⁸ Pp. 121–25, at 124; 1976 ICJ Pleadings (*Aegean Sea Continental Shelf*, Interim Protection) 317–20, at 319.

²⁹ How relevant it was to the Court's decision on the merits in the *Nicaragua* case! The Court in that case did not, however, seem to be notably vexed by the concept of a double burden of this nature, and served itself liberally to a theory of admissions and responsibility by acquiescence or nondenial in order to counter what might otherwise have been a double burden of disproving the acts that would have stimulated the alleged requirement of the United States to use the right of self-defense.

³⁰ The book's elegant dedication reads: "In memoriam G. G. F., *judicis doctissimi*." (Cambridge University Press should have printed the rest of the book in the same type size as the dedication; see note 34 *infra*.)

been too uncompromising, and that the practical solutions for the Court in the context of nonappearance of various sorts are more varied and flexible than Sir Gerald would have cared to accept. Thirlway's position is that Fitzmaurice should not have treated nonappearance with such disapproval, since it is something that states have always been "entitled" to do under the very provisions of Article 53.

Toward the end of the book, Thirlway deals separately with each of Fitzmaurice's six suggestions,³¹ and this closes his dialogue with the late judge. Essentially, the observations of O'Connell—that Article 53 was in part designed to ensure (and must be interpreted so as to reflect) the doctrine of "equality of arms" (pp. 177–78)—as well as Fitzmaurice's recommendations, are really aimed at the heart of the problem rather than the technicalities of response, and urge that the Court, and states, take a different approach. It is more a question of the attitude of parties—and the practical result of their actions—than it is of technical legality. Above all, it is important to identify the unarticulated major premises underlying the phenomena of nonappearance and disappearance.

Thirlway rings changes on the premises underlying nonappearance and the application of Article 53 of the Statute, as well as the implications of their overall development and the likely consequences for the Court and the litigants. The issue of "standing outside the proceedings" is a complex one. One of its distinctive characteristics is that the absent party will produce documents that take the place of pleadings, and that are transmitted to, or brought to the attention of, the Court in an irregular manner.³² It has already been noted how the United States submitted a State Department apology for the policy in respect of Nicaragua, *Revolution Beyond our Borders*, to the Registry of the Court only the day after the oral pleadings on the merits began.³³ This was concerned with factual matters. It was therefore similar to a memorandum of fact and was not the equivalent of a legal pleading or argument. For when the irregular pleading contains the substance of a jurisdictional pleading of law, made as it were from behind the arras, the difficulty for the respondent becomes even greater. Thus, Thirlway makes the useful suggestion that informal jurisdictional objections should be treated as if they were "true preliminary objections in an irregular form" (p. 172). On the other hand, bound as it is by its duty to make sure that the applicant's claim is well founded in fact and law, the Court will naturally consider such irregular pleadings with care (and, in some instances, might even have suggested their informal communication).

When one looks at the overall situation at arm's length it becomes patently absurd: a party that is not a "party"; pleadings that are not "pleadings"; and the appearing party faced with the worst of both worlds, and being required to meet a phantom case. In the long run, Thirlway appears to suggest that nonappearance as a "technique"—although perhaps not spe-

³¹ These suggestions concerned the rights and duties of states vis-à-vis the Court in matters of nonappearance. See note 9 *supra*; Thirlway at 166–74.

³² See Thirlway at 128; concerning "unofficial and unorthodox methods," see pp. 142–48.

³³ See note 13 *supra*.

cifically foreseen in 1921 by the authors of the Statute of the Permanent Court of International Justice—is nevertheless a problem with which the Court's procedures and recent practices are able to cope. In the light of the *Nicaragua* case and its likely aftermath, however, it remains to be seen whether any such flexible pragmatism is still convincing. The opinion of this reviewer is that it is not, and that the Court may have been dealt a final and mortal blow by one of its earliest and strongest supporters, the United States. Had Thirlway been able to see the Judgment on the merits in *Nicaragua* before publishing his book, he would have found that he would doubtless have written a different conclusion and that the book should, perhaps, have had a different emphasis.³⁴

The two books are as different as two books by English-speaking international lawyers could possibly be. Elkind's language is simple and direct; Thirlway's is complex and sophisticated. Elkind devotes much prose to peripheral matters. Thirlway gets right to the problem of nonappearance and rings changes on it. Elkind's book gives the impression of a pedestrian and academic study; Thirlway's that of a judge's and advocate's private dialogue with well-remembered and respected spirits. Elkind's book is obviously produced by a teacher of international law. It is a rather routine compendium, in which the chapters seem to be relatively independent of one another. This fragmentary impression is intensified by the fact that the book begins in the wrong place and does not get to its main subject until the third chapter.³⁵ Thirlway's book gives the impression of having been collated from a series of reflective notes written by a private scholar who is attached to the inner sanctum of the Court itself (p. vii), and who is preoccupied with the role of the Court and the role of judges, the nuances of jurisdiction and the subtleties of procedure.

For an indication of the widely differing styles and approaches of these books, it suffices to compare their opening paragraphs, each composed of three sentences. Elkind has produced what may be one of the least inviting and most unintelligible opening paragraphs of the last several years:

³⁴ Thirlway's book could, however, also have used more careful editing and writing. Although it is only a formal objection, this reviewer found vexing the author's habit of referring directly in the text to works cited in the meager bibliography as if they were, e.g., medical or scientific treatises. This method results inevitably in an unintelligible sentence such as: "It is noteworthy that both Favoreu and Eisemann (p. 351) quote as authority for their approach the same sentence from the classic study of Guyomar (p. 20, footnote 26; see also the comments of von MANGOLDT (pp. 518–19) on the appeal made to this passage)" (p. 36). A bit less informality and more polished editing would have benefited the book substantially. The above technique also tends to create the unhappy impression of a dialogue within a dialogue, on a level of Byzantine sophistication, which can only be clearly understood by someone who is actually cited in the course of the discussion. (It should also be pointed out that Cambridge University Press is hot on the scent of a truly false economy in publishing, as the type size employed is lamentably small; the book appears to have been set in 9-point Times Roman and the footnotes in 7-point, making anyone over the age of 30 reach for a magnifying glass.)

³⁵ The inevitable impression given is that each of the chapters would have served well for a partial outline of a lecture course, and that they might as well have been cobbled together with the assiduous ministrations of graduate students as research assistants (see the three acknowledgments of assistance at the beginning of the book).

Engelmann, in his book *A History of Continental Civil Law* remarks that the development of the law of procedure usually comes about for many people through the subjection of self-help to the supervision of the Community. In this process, the activity of the individual becomes dictated by fixed forms. The forms then comes [*sic*] to be vested with coercive power.

In contrast, Thirlway gets right to the real point:

Over the last ten years, a frequent feature of the public sittings held by the International Court of Justice for the purpose of the oral proceedings in a contentious case before it has been that the table reserved and marked in the Great Hall of Justice for the respondent party has been backed by no more than a line of empty chairs. Many of the judgments given by the Court over this period, after stating—as is customary—the name of the applicant State followed by a lengthy list of the agent, counsel and other advisers representing it, continue with the name of the respondent State *tout court*. These are two of the outward manifestations of what has appeared to be a growing procedural practice which has clearly caused the Court much concern, and has prompted a considerable amount of learned discussion and indeed criticism.

Equally telling, if perhaps somewhat arbitrary, is a comparison of the last few sentences from each book. Elkind closes with a Wagnerian coda:

If, at the end of the exercise we face nuclear confrontation, if lesser battlefields are strewn with dead and mangled bodies, cities are devastated and the living weep, starve and suffer, so be it—as long as the States involved have not been labelled lawless by an authoritative law-determining agency.³⁶

Thirlway ends with an elegant, baroque flourish:

To seek to ensure the performance of a judicial decision is, in the structure of international society, a political and not a judicial act: and in this as in other respects, the distinction between the political and the judicial should be jealously preserved. The political impact of a decision of the International Court may of course be immense; but that is not its essential characteristic. *Judicia sunt tanquam juris dicta, et pro veritate accipiuntur*. If they are to be so accepted, even by those parties who have chosen to refrain from participation in the proceedings from which they emerge, judgements must not fail to retain the judicial character expressed in this tag, and emphasized by the very terms of Article 53 of the Statute of the International Court.³⁷

If one had to pick one book over the other, clearly Thirlway's is the more finely wrought. He argues with himself and the respected phantoms so effectively that the book is in fact a pleasure to read twice. Yet, there is reason to believe that much of Thirlway would be lost upon a reader who had little

³⁶ The irony intended by the sentence is somewhat lost in the formulation.

³⁷ The Latin statement is given as being from 2 COKE, INSTITUTES 537, and can be translated as: "The judgments are received as statements of the law and, as such, are the truth."

knowledge of the subject. The assiduous student who truly desires to advance on this difficult and vexing topic would do well, perhaps, to use Elkind as a basic and relatively pedestrian guide to the cases, and Thirlway as an intellectual discourse upon them. The former is an attempt to be authoritative and deliberate; the latter eschews such linear efforts, and models itself more on the brilliant discourses of Lauterpacht *père*.³⁸

SUCCEEDING DEVELOPMENTS IN THE NICARAGUA CASE

The departure of the United States in January 1985 from the merits phase of the *Nicaragua* case³⁹ went beyond the normal pattern of nonappearance that had hitherto developed and to which these two books are addressed. It is in fact unprecedented in the experience of either the present Court,⁴⁰ or its predecessor, the Permanent Court of International Justice, and would surely have caused Sir Gerald Fitzmaurice considerable anxiety. Rather than being an instance of "non-appearance" in proceedings before the Court, it is more correctly a case of "disappearance" from those proceedings.⁴¹ It conveys the irresistible impression of the "sore loser": of a party before the Court who is prepared to respect the Court's writ only as long as the decision is (or will be) favorable.

The departure also implies, somewhat absurdly, that the disappearing state's original acceptance of jurisdiction, and arguments on the jurisdictional points, lacked bona fides; it suggests a "heads I win, tails you lose" attitude, which must be inherently antithetical to any fair apprehension of international law and the minimal shared perceptions underlying the international legal process. Although Thirlway expressed the view that Fitzmaurice went too far in his suggestion that nonappearance was analogous to the self-judging or automatic reservation of the Connally type,⁴² he might indeed now feel otherwise concerning disappearance after an actual appearance and full argument on jurisdiction: the position taken by the United States in the *Nicaragua* case.⁴³

³⁸ See H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (1958).

³⁹ *Supra* note 3.

⁴⁰ See comments by this reviewer, *supra* note 10, at 994.

⁴¹ Not only was this disappearance abrupt and unprecedented; it was also accompanied by a "reservation of rights," which ominously anticipated the attitude of the United States as being one of disregard for the ultimate decision and for any duty to comply therewith under Article 94, paragraph 1 of the Charter. See "U.S. Withdrawal from Proceedings Initiated by Nicaragua" (reference to U.S. *Digest*, Ch. 13, §3), 79 AJIL 438, 439 (1985) (quoting U.S. Department of State telegram No. 017113 to the American Embassy at The Hague (Jan. 18, 1985)). The Court in its Judgment took appropriate note of this "reservation of rights" and took pains to deal with it aggressively: see *Nicaragua Merits*, *supra* note 3, at 23-24, paras. 26-27.

⁴² See Thirlway at 154:

This criticism, however, seems to us to go too far. The "Connally" reservation amounts to a premeditated restriction on the future jurisdiction of the Court, designed to enable the State to pick and choose in the future what disputes it will permit the Court to determine; non-appearance is a reaction to what is seen as the threat of judicial settlement in a sensitive area (see FITZMAURICE, pp. 100-2), and not a predetermined policy vis-à-vis the Court.

⁴³ See generally the Department Statement, *supra* note 17.

The tragic irony of the situation is of course that a considerable part of the legal and factual substance of the actual decision in the Nicaragua case seems to have been predetermined by the fact that the respondent had disappeared. It is quite possible to assert, for example, that any use of the affirmative defense of the exercise of the "inherent right of collective self-defense" by the United States against Nicaragua (on behalf of El Salvador) could only be made convincingly if El Salvador were either present by intervention or active in the proceedings and submitting materials in lieu of discovery (in the manner in which Yugoslavia, for example, assisted the Court in the *Corfu Channel* case).⁴⁴ Yet, with the United States totally absent from the proceedings in 1985, how could El Salvador ever have been expected to renew the application to intervene that had proven unsuccessful at the phase of jurisdiction and admissibility?⁴⁵ How could it have been expected to produce information that would have established self-defense against an alleged transborder aggression by Nicaragua? No matter how assiduous the Court (or any of its judges) may be in seeking to serve as a surrogate for an absent party in the performance of its duties under Article 53, it cannot produce evidence that has not been produced or entertain arguments not made.

Disappearance from Court proceedings therefore means that any real hope of producing evidence or arguing on the facts is abandoned. It also means that an absent respondent—which must otherwise have relied on an affirmative defense—is, by that very absence, abandoning almost any hope of asserting that defense: for the United States to disappear from the *Nicaragua* case was for it—wittingly or unwittingly—to discard the ability to assert the one defense that might have relieved it of international responsibility. The U.S. decision to boycott the merits phase of the *Nicaragua* case was tantamount to permitting Nicaragua to advance without effective opposition a multitude of factual assertions; it was also an abandonment of the affirmative defense of collective self-defense against Nicaraguan aggression, which had been so long and widely publicized. That decision seems to have so little to recommend it that it is difficult to understand in any framework. It depreciated the case of the United States and made it forever impossible to advance a convincing affirmative defense. It ennobled the case of Nicaragua and in effect handed its legal team almost a blank check.⁴⁶ It made an unfavorable judgment for the United States almost inevitable, and, even worse, placed the United States in a permanently "no win" situation vis-à-vis the Court's final decision and the United Nations itself. It had the obvious effect of forcing an anticipatory repudiation not only of the Court, but also of the UN Charter itself, there being hardly any provision of the Charter more crystal clear than Article 94, paragraph 1.⁴⁷

⁴⁴ *Corfu Channel* (U.K. v. Alb.), Merits, 1949 ICJ REP. 4, 17 (Judgment of Apr. 9).

⁴⁵ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Declaration of Intervention of the Republic of El Salvador, 1984 ICJ REP. 215 (Order of Oct. 4).

⁴⁶ *Pace* Judge Schwebel and his heroic efforts to establish what he perceived as some sort of forensic balance in the proceedings.

⁴⁷ "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

It has therefore set the stage, as in a Greek tragedy, for a likely confrontation between the United States and the Court, and perhaps also for the permanent discrediting of the United States with the international community. Long a leader of that community, the United States now appears to be evasive, arrogant and self-serving. The worst thing, perhaps, is that *the situation cannot ever be reversed or remedied*. There is no way of undoing history; this weak and unintelligent decision will haunt the United States for years in its relations with the Court and international law.

As far as Article 53 is concerned, the *Nicaragua* case has made the most important contributions of any decision in the history of the Court. It has gone far beyond the *Corfu Channel* case in the development of the Court's application of rules of evidence; there it employed circumstantial evidence and unexplained inferences in the absence of cooperation by a party,⁴⁸ and also proceeded to evaluate damages despite that party's subsequent disappearance from the courtroom.⁴⁹ The *Nicaragua* case combines a growth of the Court's powers and abilities under Article 53 with a development of the Court's methodology in respect of evidence and facts. The *Nicaragua* case is clearly one where a large part of the decision rests upon complex facts; yet such facts were by and large being advanced by only one side, and were in effect wholly uncontroverted by the other (although the Court did take into account a U.S. White Paper submitted in an irregular manner, it did not in the end give it much weight).⁵⁰

The effects on the doctrine adopted by the Court are interesting: an effort was clearly made by the Court to weigh the Nicaraguan assertions as against the likely or possible assertions that would have been made by the United States had it been present.⁵¹ An effort to rationalize, giving weight to certain assertions, and to finding certain facts, also had to be made. Fully conscious of its duties under Article 53 and of the unusually broad spectrum of factual assertions that had to be weighed, the Court engaged in an unprecedentedly extensive elaboration of its theories of proof.⁵²

⁴⁸ *Supra* note 44. *Corfu Channel's* main contribution to the development of international law was not in the area of the jurisprudence of Article 53 as such, since Albania was present in Court during the merits phase of the proceedings.

⁴⁹ *Corfu Channel* (U.K. v. Alb.), Assessment of Amount of Compensation, 1949 ICJ REP. 244 (Judgment of Dec. 15).

⁵⁰ *Revolution Beyond our Borders*, a State Department White Paper. (See note 13 *supra*.) Judge Schwebel was of the opinion that the Court should have given this document far greater weight: Dissenting Opinion of Judge Schwebel, 1986 ICJ REP. at 259, 318-20, paras. 122-27 (especially para. 122, at 318); and see also the Dissenting Opinion of Judge Oda, 1986 ICJ REP. at 212, 240-45, paras. 61-69 (especially *id.* at 242-43, para. 62).

⁵¹ 1986 ICJ REP. at 24-25, paras. 29-30.

⁵² The Court referred to United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3 (Judgment of May 24), in its discussion of the use of judicial notice of facts that are public knowledge, largely conveyed in the form of press information: "although it is perfectly proper that press information should not be treated in itself as evidence for judicial purposes, public knowledge of a fact may nevertheless be established by means of these sources of information, and the Court can attach a certain amount of weight to such public knowledge." *Nicaragua Merits*, 1986 ICJ REP. at 40-41, para. 63. (See generally *id.* at 38-44, paras. 57-73; and, for examples of varying treatment, see p. 53, para. 92; pp. 65-66, para. 117; and p. 80, para. 146.)

A combination of various elements was formed into a practical framework for establishing facts: public knowledge, commonly known information, public announcements by high government officials and press reports or other accusations that were left uncorrected or uncontroverted.⁵³ The Court formulated a rule of accepting uncorrected statements made by high public officials when those statements were against the interest of the relevant state,⁵⁴ but not accepting mere favorable assertions by such officials, which could be considered to be self-serving.⁵⁵ Much reliance was also placed upon press reports that remained uncontroverted after there had been ample opportunity to challenge them.⁵⁶

It would have been most interesting to see what these two books would have done with the *Nicaragua* merits decision or even, more exactly, with the unprecedented situation represented by the positions of the parties. One damning implication—particularly in Thirlway's book—is that the disappearance of the United States from the Court in 1985 was far and away more serious than anything hitherto experienced. Not only that: even Thirlway did not expect it. The fact that the United States appeared to contest the proceedings on interim measures in the *Nicaragua* case in 1984 was hailed by Thirlway as the precise opposite: an "encouraging development."⁵⁷ The horrifying ultimate actual position, where a party marched out of Court indignantly after *losing* the arguments it had so energetically made, was far closer to the situation identified by Thirlway when he wrote:

It could be, of course, that while the fact of non-appearance in proceedings before the International Court could not properly be criticized, such non-appearance might be explained by the State concerned in terms which would render its general conduct vis-à-vis the Court reprehensible. For example, it might repudiate the whole principle of judicial settlement, to the prejudice of the maxim *pacta sunt servanda*; or it might question the impartiality or the independence of the Court [p. 138, italics added].

Alas, this is precisely what the United States has accomplished.⁵⁸ Thirlway continues, and paints unconsciously (albeit in the context of nonappearance relating to interim measures of protection) the very picture of what the

⁵³ *Id.* at 40–44, paras. 63–72.

⁵⁴ *Id.* at 41, paras. 64–65 and 42–43, paras. 69–70.

⁵⁵ *Id.* at 41, para. 64 and 42–44, paras. 69–72.

⁵⁶ Undenied press reports, or uncorrected press reports of official statements, may be accepted, but the Court is cautious when there is no independent verification such as origination, inaction by the government at which the report is aimed or failure to deny important matters forming the substance of the report. (See, e.g., *id.* at 47, para. 78; 49–50, para. 84; 51–52, paras. 88–89; and 80, para. 146; and see, by contrast, the Dissenting Opinion of Judge Schwebel, *id.* at 317, para. 120 and 323–27, paras. 135–45.)

⁵⁷ "[A]s counsel for the United States pointed out, no other State had appeared in response to a request for provisional measures. *If a turn of the tide is at hand, the moment is propitious to try to strike a balance*" (p. 176, italics added).

⁵⁸ See, e.g., Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, reprinted in 24 ILM 246 (1985) and in large part in 79 AJIL 439 (1985), and related statements.

United States would be doing in the broader context of the merits a few months after his book was published:

[T]he existence of the *compétence de la compétence* . . . should require the absent State to bow to the Court's decision. It is entitled, at that stage also, to continue to abstain from participation in the proceedings; *but it is not entitled to insist, stamping its foot, as it were, that its own view of the legal situation is right and that of the Court is wrong* [p. 139, italics added].⁵⁹

Indeed, developments since 1985—and perhaps others to come—may make the situation one where the strict views of Fitzmaurice may appear vindicated: “He describes the ‘no appearance’ technique as one which is ‘likely to bring the whole system of the Court’s obligatory jurisdiction into disrepute and lead not merely to a contraction but to a virtual obliteration of it’ ” (p. 137). It would be hard to say that, in the wake of the U.S. decision not merely to withdraw from the *Nicaragua* case, but also to complete the process and terminate its Article 36(2) optional clause declaration, this characterization is wide of the mark.

In conclusion, the deplorable trend of nonappearance as a technique in litigation of contentious proceedings before the Court is profoundly dangerous to the Court as an institution and to the overall fabric of international law.

There is some hope that the trend may at last be turning, based on the dignified and appropriate responses given so far by Costa Rica and Honduras (but *not* by the United States) to the litigations commenced against them by Nicaragua in July 1986.⁶⁰ The indications so far received are that both respondents will appear to defend their cases, the former on the merits (with the possibility of a counterclaim), and the latter on jurisdiction (by way of preliminary objections).⁶¹ Let us hope that these two small states will set an example to the greater powers and that their attitude may herald a change in the climate attending litigation before the Court.

The long-term implications of the “no-appearance” technique are serious. If by 1970 it had become inevitable that a respondent state in the International Court would always file preliminary objections to jurisdiction—as the United States did in 1984 in *Nicaragua*—it can be said that in the succeeding 15 years the “no-appearance technique” had become almost the physical analogue of making the legal argument that the Court did not possess jurisdiction. It had become a form of “acting out.”

More seriously, it is also a portent of ultimate noncompliance, of lack of respect for the obligations incumbent upon member states under Article 94 of the Charter; it represents a dogmatic refusal to recognize in the Court

⁵⁹ This is, precisely, what the United States is now in the process of doing.

⁶⁰ See ICJ Communiqué No. 86/10, July 29, 1986, announcing the filing of two applications by Nicaragua on July 28, 1986, one against Costa Rica and one against Honduras, each entitled “Border and Transborder Armed Actions” (Nicar. v. Costa Rica; Nicar. v. Hond.).

⁶¹ Both respondents have appointed agents; Honduras is expected to contest its case on jurisdictional grounds, and Costa Rica has reserved the right to present a counterclaim on the merits: *see*, respectively, ICJ Communiqué Nos. 86/11 and 86/12, Sept. 3, 1986.

the jurisdictional status it should otherwise possess. It is more than a state's mere objections to the Court's jurisdiction; or arguments against it; or disagreement with the Court's opinion. *It is an outright refusal to acknowledge the validity of that jurisdiction, logically founded on an inarticulated major premise that the Court's writ is unenforceable.*⁶² Nonappearance—and a *fortiori* disappearance—thus opens the door irretrievably to outright repudiation of a binding judgment of the Court, a situation that has not ever exactly occurred, save in the *Nicaragua* case.

With liberty to absent themselves from proceedings, and liberty to disregard adverse rulings of the Court, states will create an environment where, in 5 or 10 years, the International Court will have become a purely occasional court—one used primarily in instances where the parties have agreed on a *compromis* or special agreement.⁶³ This presents more of the aspects of a mere arbitration tribunal than of a real, statutory court—in particular, one intended to be the principal judicial organ of the United Nations. An important component of world order will then have been irrevocably destroyed, and the intentions and principles of 1921 and 1945 will have been buried until the next time around—if there is one.

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Recueil des Cours de l'Académie de Droit International de La Haye, 1981. 3 vols. (Vols. 170, 171 and 172 of the collection.) The Hague, Boston, London: Martinus Nijhoff Publishers. Vol. I, 1981: pp. 431; vol. II, 1982: pp. 442; vol. III, 1982: pp. 423. \$30/vol.

Although the general course in public international law given at the Hague Academy in 1981 has not yet been published, and a gap (vol. 173) has been left in the numbering system for the missing volume, fairness to the other lecturers, the community of those interested in public international law and the students of the Academy dictates a partial review now of the 1981 course.¹

Three courses in 1981 focused on the concept of *jus cogens*. The first, by Professor Antonio Gómez Robledo (National University, Mexico, and Mexican Ministry of External Affairs), treats the jurisprudential history of the concept in *Le Jus Cogens International: Sa Genèse, Sa Nature, Ses Fonctions*. It begins with a very brief summary of the antecedents of the notion that a contract in municipal law is subject to overriding public policies limiting the legal obligation of a contracting party to using legal means to achieve a legal end. A maxim in Justinian's *Digest*,² adopted by the Napoleonic Code and

⁶² See Thirlway at 156–57.

⁶³ And even, as in the *Gulf of Maine* case, actually selecting the panel of sitting judges.

¹ The courses for 1982, 1983 and 1984 have been published in their entirety and will be reviewed shortly.

² "*Ius publicum privatorum pactis mutari non potest*" (Public law cannot be altered by a private contract). DIG. JUST. 2.14.38.

other civil law codifications (the author does not mention the Anglo-American common law relating to contracts being void because contrary to public policy), is seen as maintaining the principle as a general principle of law recognized by civilized nations. Its adoption into public international law rests upon accepting the existence of an unwritten overriding public policy within the international system and an analogy between the international community and municipal legal orders that is not self-evident. Rather than rest on half-forgotten notions of the *jus gentium* among the formal sources of law, Gómez wisely turns to the opinions of jurists and states as expressed during the drafting and ultimate adoption of Article 53 of the 1969 Vienna Convention on the Law of Treaties, which declared a treaty to be void if it conflicts with a "peremptory norm of general international law." He notes that this shifts the idea of *jus cogens* from a basic natural law notion to a positive expression of legal principle. He points out with many examples the difficulties that delegates of many countries had with that shift, and that the failure to specify any substantive content to the rule adopted in principle was deliberate. He warns against the temptation to exaggerate the legal force of human rights or other deeply felt moral obligations into their being rules of law, much less "peremptory" rules.

After a chapter summarizing the views of leading publicists regarding the existence of a useful concept of *jus cogens* in international law, Gómez finally turns to his own analysis. There seems much that is questionable here. For example, he discusses the prohibition of the use of force in the Charter of the United Nations (pp. 97-100)³ and points out the limits of applicability of that prohibition in light of both the failure of the Security Council to fill the role envisaged for it by the framers and the expansion of the role of Article 51 to fill the teleological vacuum. But he does not consider the obvious inability in practice for treaties, from the League Covenant through the Kellogg-Briand Pact to the UN Charter, to limit the legal use of force in true self-defense, even, despite the limiting words of Article 51 of the Charter, in true anticipatory self-defense. This seems odd; by Gómez's own logic, if there is any rule of public international law that deserves the label *jus cogens* as the term is used in Article 53 of the Vienna Convention, it would be the rule permitting military action in true self-defense. He sees no basis for objecting to calling *jus cogens* the supposed rules of public international law forbidding piracy, slavery or genocide (p. 108), but there is no consideration of the content of those supposed rules or their place in the international legal order in light of the fact that all the internationally current formulations regarding piracy and genocide are aimed at individuals, not at states; and it is doubtful that there are any norms binding states in any meaningful way with regard to any of the three topics in the absence of treaty. Gómez concludes on firmer ground that for a rule to have the legal

³ Only Article 2(4) is mentioned as containing that prohibition. There is no explanation as to why Article 2(3), which is the provision of the Charter that would seem much more appropriate to limit the use of force in disputes regarding authority over territory or political independence, is ignored.

results of *jus cogens*, states must agree not only to the norm, but also to its being nonderogable, a quite different matter; and that all valid legal norms in the international order can properly be termed *jus cogens* if the legal result of violation is nullity (pp. 112–13).⁴

Gómez enters into some doctrinal discussion of various publicists' analyses of intertemporal law and of problems in interpreting the Vienna Convention's determination that a treaty may be rendered null by a supervening rule of *jus cogens* created after the conclusion of the otherwise valid treaty. He then addresses the legal result of the label "nullity." This discussion seems more focused on technical questions of intertemporal law than on the real issue, which is the fundamental legal notion of "effectiveness": that all facts must be labeled legally in a way that conforms to good faith perceptions of reality. That issue is discussed briefly in a later section, noting the failure of deferred recognition really to hinder aggression and the futility of total nonrecognition of facts (pp. 196–98). But again the obvious conclusions are missed: that the rule of effectiveness might itself be a rule of *jus cogens* that cannot be ignored or provided against by treaty; and that breaches of the law remain breaches even if new facts are accepted as the basis for new legal relationships (as they eventually must be), so that the quest for "nullity" legally cannot, and morally need not, involve a denial of the reality of facts. Instead, Gómez concludes with De Visscher that adherence to "principle" (presumably humanitarian or other moral principle) is more important than acceptance of reality, as if the two could be in opposition as a matter of law.

The essence of the discussion, then, must remain the search for "principle" in the translation of moral imperatives to legally binding rules, and labeling as nonderogable, *jus cogens*, what the author would like to be the highest values. Those principles he finds in some UN General Assembly resolutions, some terms of the UN Charter, some laudable notions about fundamental human rights, some common polemical assertions regarding the law of the sea or armed conflicts and the by now usual confusion regarding the phrase "obligations *erga omnes*" used, but not applied, by the International Court of Justice (ICJ) in its 1970 *Barcelona Traction* Judgment. There is no analysis of why some General Assembly resolutions are binding when the UN Charter does not give legislative power to that body, or why obligations *erga omnes*, even if they can be said to exist in international society, cannot be altered as between themselves by parties to a treaty. There is no consideration of how a state not legally affected by another's violation of an obligation *erga omnes* can get the *jus standi* necessary to justify diplomatic correspondence about the issue outside of the framework of an international organization

⁴ This ingenious way to use the phrase *jus cogens* in the literature of public international law presumes that there is a purpose to finding such a way. But the issue has never been what the legal result is of using the phrase, but what conditions must exist to justify that use. To the extent the proposal makes sense, therefore, it is circular in finding the conditions to justify the use to be those that flow from its use. The construction proposed by Gómez, fully acknowledging Michel Virally as an earlier analyst making the same proposal, seems to serve no other purpose than to justify using the term, and since it fails to do that it should, on the basis of Occam's razor, be rejected. But this leads to a realm of discussion not appropriate for a review.

whose purview has been agreed by all concerned. Thus, there is no discussion of what the notion of *jus cogens* can mean in relation to obligations *erga omnes*.

In sum, this seems a learned, elegantly written and very well documented work on *jus cogens* that presumes the answers to all the difficult questions and does not address the real objections to its basic orientation.

Levan Alexidze (Tbilisi State University, USSR) lectured on the *Legal Nature of Jus Cogens in Contemporary International Law*. His perspective is current Soviet orthodoxy, insisting that treaties represent a method of coordinating the will of independent sovereigns, implying, but not saying, that they are not binding in the usual sense of the term because they cannot diminish the discretion of a sovereign. More interestingly, Alexidze points out that in Soviet municipal law there is no such thing as private law; all legal relations are matters of public policy. Therefore, the language of *jus cogens* usually used by its advocates cannot be applied with analogies to the Soviet system. But this position of principle in fact is not different from current concepts of law in non-Soviet societies, and Alexidze himself points out that within the Soviet system distinctions are in fact drawn between "categorical" or "imperative" norms and dispositive norms (p. 235). He concludes that there are nonderogable laws in all legal systems: those norms made nonderogable by positive enactment; those enactments that support the fundamentals of the juridical order whether or not recognized as nonderogable by the legislator; and those embedded in the legal order by political and moral values accepted by the dominant social forces of the system (p. 241). In this sense, he concludes that some norms of public international law qualify as *jus cogens*. In specifics, he finds that consent can derogate from diplomatic immunities and rights in airspace and water, and reads the Vienna Convention as including within the notion of *jus cogens* only legal rules, not moral precepts. His final listing of norms that deserve the label *jus cogens* includes only those moral rules "which correspond to the objective laws of development of the community of . . . peoples at the present stage," including the inviolability of the major economic, social, cultural, political and civil rights of individuals and prohibiting national appropriation of parts of space, including the high seas and international airspace (p. 262). But he does not define the system that creates those "rights," and his position that the global commons are governed by the *jus cogens* seems to contradict his earlier position on this subject. Given this rather tendentious conclusion, it is not surprising to find that, in Alexidze's view, because of Soviet foreign policy the "peoples of the East bordering the Soviet State" now enjoy non-interference in domestic affairs and inviolability of their territorial integrity (p. 250). It is hard to say whether the "peoples of the East" include Poland, Afghanistan, the Siberian territories acquired by the Russian Empire in the 19th century, or the inhabitants of the Habomai Islands who are, or at least were, ethnically Japanese. If not these, it would be interesting to know just whom Alexidze means. But, if the self-serving assertions are appropriately discounted, and the usual confusion between *jus cogens* and *pacta tertiis*, the inability of states within the international legal order to derogate from the rights of third states by treaty, is disregarded, the insight into Soviet views of *jus cogens* seems concise, informative and useful.



Finally, Giorgio Gaja (Florence) gives the positivist view of *jus cogens* in *Jus Cogens Beyond the Vienna Convention*. Citing the ICJ's unreasoned and unapplied dicta about the theoretical existence of obligations *erga omnes* and universal *jus standi* in the *Barcelona Traction* case, Gaja points out that in fact no state can be expected to complain of such violations when it is not legally affected, and none is known in the available literature ever to have done so in a form that would imply a reality to the dicta. He suggests that if legal content is to be put into the theoretical notion of *jus cogens*, international lawyers should suggest how it can be done (pp. 280, 289). One way he then explores is the notion of "international crime" in Article 19(2) of the International Law Commission's draft articles on state responsibility.⁵ He concludes with what might seem excessive caution that the two concepts of "crime" and *jus cogens* do not entirely coincide, but that "it would be reasonable to look for acts entailing such [criminal law] consequences . . . in the area covered by peremptory norms" (p. 301). This, then, assumes that there is some useful function to be served by presuming the existence of both a category of "international crime" and of peremptory norms, and stops short of actually finding any content in either concept other than generalities derived from nonbinding documents and the views of publicists.

When three scholars who are familiar with theory and who accept the validity of the category of *jus cogens* within their widely different intellectual models all come up with moral assertions but can invest the category with no clearly legal content, skepticism must accompany the notion of *jus cogens*. Absent a willingness of statesmen to accept a community lawmaking process by which their policies that do no legal injury to any outside constituency are nonetheless subject to legal regulation by that outside constituency, there can be no substance to assertions of universal standing or obligations *erga omnes*. Absent a weighing of values including national sovereignty and consent as a check on irresponsible lawmaking, there cannot even be any true moral content to *jus cogens*. If there is any content to the notion, it must be in the area of permitting action in self-defense and other national policies that all statesmen must take in order to survive and discharge their internal responsibilities, and that none apprehending reciprocal application of the rules ever condemns when taken by others. Since this conclusion, however evidenced, is not likely to be palatable to those seeking to impose their human rights and other values on third countries that do not share their enthusiasms, it can be predicted that there will be a large body of literature on *jus cogens* to join in eventual oblivion the literature on *actio popularis*, the binding effects of unilateral declarations, the lawmaking authority of the UN General Assembly and the many other occasionally fashionable attempts by scholars and lawyers to construe themselves into the position of legislators for all. This seems an ironic conclusion to draw from the Hague Academy's special attention to the concept of *jus cogens* in 1981. But, if fairly considered, it might prove to be a far more productive conclusion than the Curatorium of the Academy expected.

⁵ [1980] 2 Y.B. INT'L L. COMM'N., pt. 2 at 30, UN Doc. A/CN.4/SER.A/1980/Add.1, reprinted in 18 ILM 1568, 1573 (1979).

A fundamentally challenging and important course was given by A. E. Gotlieb (Foreign Ministry, Canada), entitled *The Impact of Technology on the Development of Contemporary International Law*. It focuses on three major areas of current concern: the exploitation and control of the resources of the sea and submerged land; the various uses of outer space; and the control and transmission of information. Beginning with the law of the sea, Gotlieb suggests that the rather formal voting procedures for amending the proposals of legal experts at Geneva in 1958 were replaced for the long negotiations culminating in a consensus law of the sea text adopted in 1982 (but not yet in force) because of a shift in perception. In 1958, statesmen thought they were codifying the *lex lata* and participating in incremental development of the law. In the negotiations leading to 1982, statesmen conceived themselves to be a legislative body making new rules for radically changing circumstances. This experience is then related to the entire process by which multilateral treaties have increasingly been used in conjunction with state practice to create new legal rules. Thirteen features of the contemporary lawmaking process are identified, emphasizing the increased pace of the process (despite the long gestation period of the 1982 Law of the Sea Convention) as technology has brought national interests and capabilities into the areas of historical jurisdictional overlap and diminished the time available for assertion, counterassertion, correspondence and compromise. But until the pace, direction and probable political and social implications of technological development are understood, sensible statesmen will find it difficult to agree on rules; the result has been a moderately successful effort regarding the law of the sea, an overgeneral and possibly meaningless effort with regard to key parts of the law relating to the uses of outer space, and an evolving interplay between international organizations, such as the International Telecommunication Union and its World Administrative Radio Conferences, and traditional diplomatic correspondence with regard to problems arising out of differing national values served (or disserved) by direct broadcast satellites, remote sensing and the new ease in shifting the situs of personal and technical data.

In general, the course is meticulous in detail and fascinating in showing the negotiating process as it really works in situations in which statesmen conceive of their activities generally as lawmaking. Where the interests and values of different states have clashed beyond hope of meaningful compromise in the foreseeable future, at least until political and legal thought has absorbed the implications of new technology on the current distribution of legal rights and powers and political influence, Gotlieb sets out in Aristotelian detail and conciseness the competing interests and values. In those cases he does not attempt either argument or prediction as to the future direction of the law, and his course is greatly strengthened by its objectivity. This is a magnificent introductory course in the problems of international society as it attempts to adjust itself to rapidly changing entrepreneurial and national capabilities.

A considerably more detailed, but also more superficial, analysis of the current status of maritime boundaries, seaward, between opposite and lateral

shores, was presented by Dr. S. P. Jagota (Ministry of External Affairs, India). It reviews briefly the pertinent treaty texts, including an annex listing and giving parties, dates of signature and entry into force, and some publication data for 75 specific (two- and three-party) delimitation agreements. It also summarizes the results of the ICJ and arbitral decisions in maritime boundary delimitation cases, including the *North Sea* and British-French *Continental Shelf* cases and the abortive *Aegean Sea Continental Shelf* case between Greece and Turkey. Some attention is given to the lateral seaward boundary problems between states of the United States, but this is acknowledged to be little more than a digest of an article in this *Journal*.⁶ A chapter then reviews the procedures and some of the substance of the negotiation leading to the final text of the 1982 UN Convention as it relates to maritime boundaries. The approach throughout seems to be descriptive more than analytical, and heavily statistical, showing, for example, how many of the 75 listed treaties adopted a median-line lateral or opposite boundary (48), how many modified such a line (17) and how many adopted a negotiated line (10). The date of publication precluded inclusion of the Libya-Malta, the Libya-Tunisia and the United States-Canada boundaries, but the data running through 1981 seem useful for those wanting a handy guide to the current situation of many maritime boundaries and some clues for further analysis of the trends of the negotiations and possibly of the law.

The Problem of Namibia in International Law was addressed by Ralph Zacklin (United Nations). He begins by pointing out that the problem of Namibia is not primarily an international legal question, but a political question, the product of a history of colonial enterprise, paternalism and strategic and economic competition. But the political questions were fought out to a considerable extent at first in the International Court of Justice, and Zacklin sets the 1950, 1955 and 1956 Advisory Opinions in context. His description of the issues and their resolution, including minority views, is elegantly clear. But there seems excessive reticence in his failing to consider why the Court did not make reporting and other obligations under chapters IX and XI of the Charter ("International Economic and Social Co-Operation," and the "Declaration Regarding Non-Self-Governing Territories") at least the interim regime based on positive law that would limit South Africa's claimed freedom from chapter XII, "International Trusteeship System." A similar silence surrounds the mention (p. 267) that ICJ advisory opinions are not as such binding on the requesting organ. There is an implication that that organ, which, in the Namibia situation, became in fact politically committed to an adversary's position on the law, could accept or reject the Court's view in its own resolutions as if it, the organ, were legally empowered to legislate. But the legal situation is far more complex than that, and it would have been useful to have Zacklin's expert analysis of it, or at least some indication that the failure of the Court and national representatives of states members of the United Nations to think through the legal complications might have

⁶ Charney, *The Delimitation of Lateral Seaward Boundaries Between States in a Domestic Context*, 75 AJIL 28 (1981).

been at the root of the later failed attempts to use the forms of law to achieve political and legal results that lay outside the powers of the UN political organs.

Turning to the *South West Africa* cases of 1962 and 1966, Zacklin adopts what seems a careful, but nonetheless argumentative, position supporting the *jus standi* of Ethiopia and Liberia to present the League Council's case against South Africa for violating the Mandate Agreement. But his reasons seem to be ideological. He criticizes Judge Morelli's view in 1962 that a member state of an organization, not being necessarily a representative of the collectivity, cannot argue its interpretation of the law as if it were the view of the organization. Zacklin's view (p. 272), reiterated in other contexts (e.g., p. 278), seems to be primarily that such an approach would negate the evidence of individual consent to a General Assembly resolution as significant to holding the voting state bound by the view of law expressed in the resolution. But it is not enough that a publicist, however learned, would like to construe some legislative authority in the General Assembly on some rationale out of the terms of the UN Charter—terms that were designed to withhold that authority in return for dropping the universal veto that wise statesmen had insisted on before. States do vote for some resolutions in the General Assembly only because they are not binding.⁷ And there is both in practice and in law a distinction between members of the collectivity and the collectivity as such, just as there are legal and practical differences between members of the U.S. Congress and the collective acts of the Congress as such. Responsibility for individual votes is moral and political, not legal, in both systems. Zacklin's conclusion is certainly correct, that theories about law frequently determine the votes of ICJ judges. But to contrast the "teleological or sociological" on the one hand (those who would apply the law to pressure South Africa to relinquish its claimed rights in Namibia) with the "conceptual or formalistic" on the other (those who would distinguish most sharply between the *lex lata* and political or moral imperatives) seems to miss the point. Without a deeper analysis of the role of *jus standi* in the international legal order, recognizing that every known municipal legal order also limits the power of an individual to trigger the machinery of the law in cases in which the individual injury is not significantly distinguishable from the common injury (as in the case of public nuisance in Anglo-American tort law), all the commentary seems more a criticism of the verbose superficiality of the Court than of its conclusion.

It is clear that the 1966 Judgment ended the attempt to use the law directly to remove South Africa from Namibia. The General Assembly and the Security Council reacted to this self-removal by the Court from the Namibia situation by enacting the strongest resolutions that their voting members would accept. This produced a muddle sufficient for yet another referral to the Court for an interpretation, pronounced in an Advisory Opinion of 1971. Zacklin approves the opinion, which involved legal constructions of

⁷ Cf. Hambro, *Some Notes on Parliamentary Diplomacy*, in *TRANSNATIONAL LAW IN A CHANGING SOCIETY* 280, 294–97 (W. Friedmann, L. Henkin & O. Lissitzyn eds. 1972).

language that had been engraved with a jeweler's tool to reach sweeping conclusions that, had they been intended, would have been easier to reach with a bludgeon. Holding South Africa's continued presence in Namibia to be illegal, states were directed to pretend that there was no such presence. A contrasting view, expressed by Judge Fitzmaurice in dissent, would have bound South Africa to the terms of the Mandate Agreement and left it to the political arms of the United Nations and states acting in the usual way on the basis of political and moral judgments to grapple with the patent inconsistency of some South African acts with its mandated obligations. Such a response is dismissed as "rigid" and "static" (p. 305). It is very hard to see why, unless the futility that comes from legal words in the absence of political and moral backing is preferred.

In a final section, Zacklin indicates that he regards Namibia's admission to formal membership in several international organizations, particularly the International Labour Organisation, as a "triumph of pragmatism over legal formalism" (p. 318). It looks to this reviewer more like a triumph of shortsighted and futile politics over pragmatism and the law and a contribution to the disintegration of hitherto productive organizations as effective specialized agencies. In a short summary conclusion, Zacklin sees the failure of these efforts to free Namibia of the incubus of South African domination as a monument to the shortcomings and ineffectiveness of international law and international organization when applied to a problem in which superior force is confronted by the exclusively moral weight of the international community. Others might conclude that the strength of positive law was in fact demonstrated in its ability to withstand the pressures of those who would make the constitutional principles of the law subordinate to political pressures. It in no way excuses the moral and substantive legal delinquencies of the Government of South Africa in Namibia or, indeed, in South Africa itself, to note that the constitutional pillars on which the international legal order rests include conceptions of *jus standi* equivalent to those applicable in all other legal orders, and effectiveness, under which "that which is" must be accepted in fact even if legal claims, political counteraction and moral opprobrium follow.

Other courses given in 1981 seem of more interest to experts in private international law than public international law. They were by Antonio Boggiano (Buenos Aires), *International Standard Contracts*; M. M. Bogouslavski (Moscow), *Doctrine et Pratique Soviétiques en Droit International Privé*; David Adedayo Ijalaye (Ife, Nigeria), *Indigenization Measures and Multinational Corporations in Africa*; Jean Foyer, *Problèmes Internationaux Contemporains des Brevets d'Invention*; and I. H. Ph. Diederiks-Verschoor (Utrecht), *Similarities with and Differences between Air and Space Law Primarily in the Field of Private International Law*.

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Encyclopedia of Public International Law. Instalment 7. Published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Rudolf Bernhardt. Amsterdam, New York, Oxford: North-Holland, 1984. Pp. xv, 555. Complete set (17 vols.), Dfl. 4,700; \$2,090.

The seventh section of this important encyclopedia (*EPIL*), which has been appearing serially, is devoted to four major areas: history of international law, law of treaties, sources of international law and foundations and principles of international law. Like its predecessors, *EPIL* assembles a distinguished college of international scholars. Their subjects are treated in 102 individual essays, ranging in length from less than a page to almost 25 pages. It would be impossible in a single review to examine every contribution. Fortunately, the material lends itself to treatment in certain broad categories.

I.

The "History of International Law" is expounded in 150 consecutive pages, with other shorter essays on particular events scattered through the volume. Eleven scholars contributed essays, some quite substantial, that, together, are designed to be temporally and regionally comprehensive. Let it be said at once: for a number of reasons, *EPIL*'s "History" is an important contribution. It will have continuing influence on study and research, even more for its scope than its content. Though not all of the essays are of the same quality, and there are some disturbing omissions, the History, taken together, is well worth the price of admission and is entitled to a review of its own. It could be usefully republished as a monograph, for nothing to compare with it has been done in English for decades.

An overview and methodological essay by Preiser calls for a focus, universal in scope, while reassuring the more timorous and parochial that this opening of the scholarly aperture not only will not "lead to a downgrading of the European history of international law" (p. 128), but will "redound" to its advantage (p. 129). Preiser himself tends to compartmentalize rather than to treat world history as shared international experience and, as in many of the other contributions, is idealistic rather than materialistic and economic in orientation. These features are refracted in his otherwise impressive *Ancient Times* (pp. 132-60) which, unfortunately, barely touches the economic life of the ancient world and skirts the Crusades, a major international event. Verosta's essay, up to the Vienna Congress of 1815, while shorter, is broader in these respects. Scupin's longer contribution, up to World War I, is a narrower examination of the evolution in this period of familiar international legal institutions. Grewe's history, up to World War II, is a competent political review but is slight in its treatment of world economy and striking in its belated, almost incidental, examination of the effect of the advent of the Soviet Union and its very, very brief discussion of Hitler and National Socialism. Since Kimminich's post-World War II history reviews (very soberly,

it may be noted) international legal principles and accomplishments after 1945, the editors and contributors would appear to have given insufficient attention to a complex of determinative events in the 20th century.

The regional historical essays are different in focus and texture. Elias's history of Africa is more constricted in geographical scope and provides relatively little on the techniques of interstate and intertribal relations. Miyazaki's history of the Far East is essentially a review of the period of European expansion into the East, with relatively little on the complex relations between territorial communities before that time and the different cultural postulates that conditioned them. El-Kosheri's essay takes Islam rather than a geographical region as its subject. Thus, the focus is sharper and more continuous, but not without cost. It excludes the great pre-Islamic state systems of the region, some of which, like Sumer, may have contributed the core vocabulary and concepts of Western law. It also excludes the non-Islamic states and thus skips the history and important contributions to contemporary conceptions of law of ancient Israel. Singh's essay on South and Southeast Asia, in contrast, develops the philosophical and ethical principles of the Sanskrit civilization and their international legal applications, including that civilization's confrontations with Islam as it expanded eastward. Truyol y Serra's Latin American contribution tends to waver between being a history of Latin American international law and one of Spanish international law. The Spanish school, almost unknown to English-speaking international lawyers, does not appear to get the attention it merits.

These criticisms should not obscure the fact that the editors are to be congratulated on the genuinely international compass they have achieved. Yet there are various puzzling gaps, e.g., intertribal and prestate relationships, for which there is now substantial historical and anthropological material; and the annals of indigenous peoples, those who have always been there but have never made it big. And curiously, while there are entries for socialist and Islamic theories, there is none for Christian conceptions of international law, aside from some fragmentary comments, e.g., Verosta's, in his evaluation of the *Holy Alliance* (p. 275). The absence of an explicit treatment of a religion so connected with the emergence of modern international law will astonish non-Western and non-Christian peoples, who, one should remember, are a majority in the world. Since the Crusades, non-Christians have had, for better or worse, innumerable opportunities to ponder the curious and passionate ways in which Christians conceived of their world and sought to reshape it in forms they assumed their god prescribed. Future readers will surely be disappointed at the absence of an authoritative comment.

Many of the individual historical essays are scholarly nuggets: Malanczuk's *American Civil War*, Blomeyer-Bartenstein's *Algeciras Conference*, Schieder's *Frankfurt Peace Treaty* and *Paris Peace Treaty* and Verosta's *Holy Alliance*, to name only a few. Others are thorough and interesting, e.g., Schlochauer's essay on the Russo-German Reinsurance Treaty, but their importance and contemporary relevance remain obscure. De Zayas has achieved a remarkable condensation of the *Spanish Civil War*, but his conclusions are puzzling. His-

torical events whose culminations are less clear and, as a result, less framed in time and space, may not lend themselves to easy encapsulation in the encyclopedic format. Thus, Münch's essay on the Balkan wars and Verosta's on the Congress of Aix-la-Chapelle will provide information to users of *EPIL* but may leave them none the wiser. A number of essays are not historical studies as such, but a key part of their method is historical: Blum's *Historic Rights*, Puente's *Natural Law* and Schwarzenberger's *Clausula rebus sic stantibus*.

While the overall focus of *EPIL's* History is happily global, the selection of particular events does manifest a certain recidivistic Eurocentrism. There are separate entries for many European wars, but none for Asian wars, though some are mentioned in passing in the larger historical essays. Many of the Asian wars have had far greater and more lasting influence than some European wars on the course of contemporary international politics and law (e.g., the Sino-Japanese war concluded by the Treaty of Shimonoseki, the Russo-Japanese war) and their absence will deprive future readers of important information and evaluation. Nor is there an entry here on the Vietnam War (though an entry for Vietnam is listed at p. 555), the Israeli War of Independence, the Algerian War of National Liberation, the Six-Day War, the Yom Kippur war and so on. All that said, the History is very impressive.

II.

The sections of part VII that deal with the nitty-gritty of contemporary international law—how it is made, how it is fashioned into treaties and how it is interpreted—present other problems to reviewers and users. Here, implicit theory and judgment become even more important.

The framework of the essays on treaty law is tightly conceived. In 16 essays in some 60 consecutive pages, many basic issues in this area of law are treated and if the total does not amount to a functional treatise, it comes close. A general essay by Bernhardt introduces the section, followed by Rosenne's *Conclusion and Entry into Force*, Karl's *Conflicts between Treaties*, Klein's *Effect of Territorial Changes*, Ballreich's *Effect on Third States*, Wildhaber's *Multilateral Treaties*, Blumenwitz's *Treaties of Friendship, Commerce and Navigation*, Geck's *Registration and Publication*, Bindschedler's *Reservations*, Grewe's *Revision*, Zemanek's *Secret Treaties*, Akehurst's *Termination and Territorial Application*, Schröder's *Validity*, Morvay's *Unequal Treaties* and Rosenne's *Vienna Convention on the Law of Treaties*. There are also related essays on *Declaration* (Fleischhauer), *Concordats* (Köck), *Contracts between International Organizations and Private Law Persons* (van Hecke), *Contracts between States and Foreign Private Law Persons* (van Hecke), *Executive Agreements* (Wildhaber), *Gentlemen's Agreement* (Fiedler), *Sei Fujii* (Trebilcock), *Codes of Conduct* (Petersmann), *Non-Binding Agreements* (Münch), *Pactum de Contrahendo* (Beyerlin) and *Self-Executing Treaty Provisions* (Bleckmann).

Because the subject matter of international agreements is relatively integrated, key parts do not readily lend themselves to atomization into discrete

units, each to be prepared by a separate authority and then reshaped into a functional treatise. There is substantial overlap between Bernhardt's introductory essay and Rosenne's entry on the Vienna Convention (which, in turn, necessarily overlaps with many of the other contributions), between *Gentlemen's Agreement* and *Non-Binding Agreements* and between the many definitional entries. Moreover, given the unity of the material treated, there are inevitably some numbing repetitions in the bibliographies of each essay. Some of the bibliographies are slim, but others, e.g., Rosenne's *Vienna Convention* and Bernhardt's *Treaties and Interpretation*, are impressive for their depth and truly international reach.

The essays themselves are remarkable condensations and many of them are quite interesting. But this reviewer found himself unpersuaded by certain judgments and evaluations, some of which, in contrast with the theoretical essays considered below, are rather radical. That, in itself, would not be worthy of comment if the policies behind the choices were made explicit. Bernhardt includes in his conception of treaty both "oral agreements" and concession agreements. There would appear to be intellectual and practical advantages, especially in democracies with complex ratification procedures, for reserving the term "treaty" for written agreements and using the term "agreements" as the generic designation to include treaties and all other methods of making commitments. I think I agree with the objective that Bernhardt seeks in his unusual use of concession agreements (one that Jennings apparently does not share; see his subchapter entitled "So-called Transnational Law," p. 281); but an elaboration of Bernhardt's reasons would have been helpful to the many readers who will undoubtedly turn to this essay.

Another departure that is refreshingly different in this section is Bernhardt's essay on interpretation. It is remarkable for its open texture: "It is the essence of the interpretation of legal texts that the interpreters are bound by legal principles which are, on the other hand, broadly phrased leaving some margin for the expression of personal convictions and for divergent conclusions" (p. 320). Textuality must cede center stage, for "in modern treaty interpretation the text, the context and the purpose of treaties and treaty rules play the most prominent roles" (p. 323). This is a very progressive view, but modes of interpretation, like every other institution of law, must ultimately be chosen and shaped so as to secure desired social and political outcomes. In the future, it may be useful to anticipate "creative interpretation's" effect of projected indeterminacy of a putative instrument on those who are considering drafting and entering into it and will have to take responsibility for its consequences. Textuality, for all of its obvious weaknesses and difficulties, is something of a reassurance; that is the message of the injunction of "good faith" interpretation of a text. The more open the texture of interpretation, the more generous the invitation to creativity, the more critical the identity of who decides. Of late, that question has given pause both to would-be treaty drafters and to those who have thought of submitting treaty disputes to third-party decision. Would it not be useful to develop two tiers of interpretation: "constitutive interpretation" with an

emphasis on policy, enhanced community order, a recognized competence of judicial supplementation and so on, and "ordinary interpretation," the interpretation of other instruments whose drafting and conclusion might be facilitated and encouraged by the expectation that what was argued, bargained over and ceremoniously inscribed will be given subsequent effect? Similarly, extended notions of the application of equity may undermine, in advance, agreement making. One should be more careful than perhaps Janis was (*Equity*, p. 74) in transposing Aristotle's conception of equity to international law. It is too often forgotten that the legal notion of equity does not mean that laws (or contracts, as the case may be) are presumptively inequitable.

The theme of the making of law plays through many of the essays in this section. In the impressive pieces on *Codes of Conduct* (Petersmann), *Custom* (Bernhardt), *Comity* (Macalister-Smith) and the very thorough, almost Spenglerian essay on *Codification* by Rosenne, one is struck by the need for a more comprehensive theory of international lawmaking. Viewing law as a process of communication in which, in addition to normative content ("do this" or "refrain from that"), coordinate communications of authority signals and control intention are modulated might aid in distinguishing so-called hard from soft law and, indeed, in the very possibility of prescription. The communication of the capacity and intention to make prescriptions controlling is to be distinguished in this regard from Schwarzenberger's discussion, in his scholarly essay on *Clausula*, of short-term sovereign convenience. Monaco's thorough piece on *Sources* comprehensively identifies sources, breaking free from the constraints of Article 38 of the ICJ Statute, but does not address the operational question of whether something emerging from a source is law. Similarly, Judge Mosler's creative expansion of *General Principles* (p. 90) does not mention the need for a constant correlation of authoritative aspirations with effective control intentions, nor does D'Amato's *Good Faith*.

III.

Although many of the 102 essays in this volume of *EPIL* are striking for their concentration and depth, one is struck, here, as in previous volumes, by their generally narrow and sometimes antiquarian jurisprudential approach. Common to a large number of the essays is a tendency to ignore the scope of contemporary international law, its policy core and the relevance of power to law. Nontraditional approaches are presented superficially and sometimes inaccurately. Bibliographies tend to be getting shorter and, it would appear, less useful. These problems are refracted in the theoretical essays, which are variously styled "Principles," "Foundations" or "Sources." It is impossible to treat all of the essays with the attention they deserve, but a few examples will suffice.

Judge Mosler's entries on *International Legal Community* and *Subjects of International Law* are striking for their very anachronistic conception of who plays in this game. "The human person does not as such take part in inter-

national relations and is, consequently, not a subject of international law in the proper sense" (p. 443). This is not the unanimous view of contributors. Petersmann, for example, assumes, as he must in his essay, that human beings are actively and legitimately involved in the legal process (p. 32). A reanalysis of law in terms of its constituent decision functions—intelligence, promotion, prescription, invocation, application, termination and appraisal—would be useful to anyone who still encounters theoretical difficulty in addressing the fact of extensive individual and group *nonstate* participation in contemporary international law.

Judge Jennings's essay, one of the longest in the collection, is also marked by this sort of anachronism. More than one-quarter of its discussion is devoted to a definition of international law. What emerges is considerably narrower than the sum total of the essays in the volume. Jennings nods briefly to recent developments and then essentially presents the international legal system, once again, as little more than the law between states. Sources of law are conceived, in contrast to Monaco's contribution, largely within the framework of Article 38 of the Statute of the ICJ. The content of international law is considered in terms of the UN Secretariat's study prepared for the International Law Commission in 1970.

The conception of law offered in most of these essays is in terms of rules, even when that formula poses theoretical difficulties for the subject being treated. Kiss's essay on *Abuse of Rights* acknowledges "the negation of a rigid conception of international law" implicit in this doctrine, but, in examining its ambit of operation, does not move beyond a variety of other rule formulations. Judge Ago's learned essay on *Positivism*, which appears to be a translation and light reworking of his earlier formulations, acknowledges some of the problems with the rigorous use of that approach, but, other than the general nostrum of objectivity, does not suggest an alternate focus. On the other hand, Schweisfurth's *Socialist Conceptions of International Law* seems, to this nonspecialist, to be a comprehensive and fair survey of the material. In contrast, Steiner's essay on doctrine and schools of thought is superficial and many of its sweeping generalizations questionable. In particular, the description of policy sciences is so marred by the most basic errors as to be little more than a crude caricature.

In the theoretical pieces, one notes a marked disinclination to address the role of power in law, as though discussing it openly would violate some taboo. One of the strengths of Positivism, though sometimes carried to the point of grotesque distortion, was its recognition of the importance of control in establishing and maintaining law. That notion is notable for its absence from many of the essays. The entry on *Balance of Power* by Alfred Vagts and Detlev Vagts is content to treat power as a "concept." Suy's cogent piece on *Consensus*, while obviously sensitive to this issue, avoids an explicit treatment of the adroit use of consensus in recent conference practice to bridge the gap between, on the one hand, the reality of power and, on the other, the increasing illusion of authority in formal international law. Here and there, one finds exceptions, especially in the shorter historical essays, but even then, there is a puzzling reticence. Malanczuk, in his essay on the Civil

War, notes that the United States itself repaired its delinquency in the *Trent* affair, after protests, representations by other European states and "British troop movements to Canada and the West Indies" (p. 12). His essay on the Monroe Doctrine is also sensitive to the power variable. Münch, more in keeping with the tenor of the volume, contents himself with pointing ambiguously to various "supervening factors."

Yet even these are exceptions. For the most part, this volume of *EPIL*, like so much contemporary American international law, seems infused with a type of voodoo jurisprudence, in which law is believed to operate, oblivious to and without need of control: the words, symbols and *urim ve-tummim* of jurists, by themselves, are assumed to have the power to change the thinking and behavior of political elites and their diverse military assets. In a way, this fanciful jurisprudence is encapsulated by Doebring, writing on effectiveness, who insists that "[e]ffectiveness is only legally relevant in so far as the legal system permits it. Effectiveness alone as a consequence of a mere factual event does not create rights" (p. 70). Would that it were so!

The essays in this section of *EPIL*'s seventh installment are not so much conservative as old-fashioned; they are pious of shibboleths that have long since been exposed and are at times simply prissy. Given the extraordinary changes under way in the world political process, they are misleading. And that is all the more unfortunate, as *EPIL* will justly stand on the reputation of the many strong pieces it contains and will be consulted by students and scholars for decades.

W. MICHAEL REISMAN
Board of Editors

Grotius et l'ordre juridique international. Travaux du colloque Hugo Grotius, Genève, 10-11 novembre 1983. Edited by Alfred Dufour, Peter Haggemacher and Jiří Toman. Lausanne: Diffusion Payot, 1985. Pp. 155.

This is a fascinating little book. There were several significant academic events held to commemorate the 400th anniversary of the birth of Hugo Grotius (on April 9, 1583). Naturally, the most important of these ceremonies took place in the Netherlands. However, this colloquium held in Geneva, whose results are reported in this volume, makes a significant contribution. It focused principally on two enduring Grotian themes, the law of the sea and the law of war. The limited space available here precludes discussion of every contribution.

Alfred Dufour's piece, *Grotius—Lawyer, Theologian, Writer*, provides an excellent introduction to the round tables that follow. Dufour acknowledges the difficulty of dealing with someone who has become a legend. We are reminded that Grotius, upon entering the University of Leiden at the age of 11, was called "a new Erasmus" and was introduced to King Henry VI as "the miracle of Holland" (p. 9). Dufour identifies two themes—peace and freedom—that seem applicable to the entire range of Grotius's writing:

"intellectual freedom, religious freedom, and national freedom—freedom is definitely one of the dominant themes, one of the essential notions that explains Grotian work" (p. 31).

The portion of the book that deals with the law of the sea is intriguing and timely. There is an unavoidable temptation to ask if the work of the Third UN Conference on the Law of the Sea might be viewed through a Grotian lens. Judge Jennings offers this wise and prudent answer:

To be sure, it would make little sense, however intriguing the exercise might prove, to try to construct a "Grotian" view of the issues at the Third United Nations Conference on the Law of the Sea. . . . And today, although the regime of the freedom of the high seas is on the retreat, the laws governing the Antarctic and Outer Space continue to illustrate the power and importance of Grotius' invention [p. 36].

Robert Feenstra and Jean Monnier provide us, respectively, with a discussion of the origins of Grotius's involvement with the law of the sea and the continuing validity of his concept of freedom of navigation. Kenneth Simmonds's contribution, *Grotius and the Law of the Sea: A Reassessment*, is a balanced, yet somewhat critical, treatment, suggesting at one point that "the timing of the *Mare Liberum* was in the end to be of greater lasting significance than its content" (p. 45). Lucius Caflisch, in a lucid piece, demonstrates that it is difficult, if not impossible, to use the authority of Grotius to oppose exclusive claims, e.g., fisheries zones and continental shelves, and to support inclusive claims, e.g., the deep seabed (pp. 56–60).

The second half of the book deals with Grotius and the law of armed conflict. Dietrich Schindler introduces the section by describing the great contrast between Grotian and modern times. Ivo Rens's *Grotius and the Traditional Doctrine of the 'Just War'* traces the history of the doctrine, placing Grotius's contribution into the proper context. Rens ends his remarks with an anecdote. In 1981, U.S. Navy Secretary John Lehman, while presiding over the launching of a new submarine, said he was convinced that military power was an instrument of peace (p. 79). Perhaps things have not changed so much in 350 years! The submarine was christened the *Corpus Christi*, the irony of which may have escaped the Secretary.

In *Grotius as a System Builder*, Georges Abi-Saab explains that most significant among Grotius's contributions is his creation of a structure or system of international law (p. 80). Grotius was able to strike a difficult balance between "Utopian idealism" and "Machiavellian realism" (p. 81). Next, Denise Bindschedler-Robert examines Grotius's views on human rights. One would expect 350-year-old views on human rights to be vastly different from modern doctrines. Grotius perceived an inalienable right to life, but only a limited right to freedom. Grotius was the first to acknowledge the right of humanitarian intervention, i.e., the right of a state to intervene in the affairs of another state when the interests of its citizens are endangered by that state (*id.*).

This book, like the person to whom it pays tribute, is difficult to summarize. One needs to narrow the scope in arranging any colloquium. The organizers accomplished this task by focusing on the law of the sea and the law of war.

As many contributors noted, we must not lose sight of the scope and wider implications of Grotius's work. Lauterpacht reminds us that *De jure belli ac pacis* "was the first comprehensive and systematic treatise on international law. . . . [and] is to a large extent a general treatise of law in its wider meaning (including constitutional law, the theory of the state, and the basis of legal and political obligation) and of jurisprudence."¹

The few shortcomings of the book derive principally from the nature of the beast. When one assembles a panel of world-renowned experts, it is difficult (and perhaps not even desirable) to see that each adheres strictly to the assigned subject. Sections of the book could have benefited from the perspective gained from greater attention to past commemorations of Grotius, for example, the 1925 tricentennial of the publication of *De jure belli ac pacis*. These criticisms are minor—the book deserves a wide readership. In a world of provisional orders, preparatory commissions and warships named *Corpus Christi*, it is refreshing and enlightening to reflect on the work of Huig de Groot.

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The Application of the Rule of Exhaustion of Local Remedies in International Law.

By A. A. Cançado Trindade. New York: Cambridge University Press, 1983. Pp. xi, 443. Index. \$59.50.

One opens a book containing the "exhaustion of local remedies" in its title with about as much enthusiasm as a teenage boy would feel when contemplating the obligatory kiss on the cheek of his maiden aunt. The topic has been surveyed and resurveyed far too often already, at least from a doctrinal standpoint. In addition, as the author, a distinguished Brazilian scholar, himself admits, the post-World War II use of lump sum agreements to settle nationalization claims has deprived "the local remedies rule of much practical significance" (p. 127). Furthermore, the Algiers Accords establishing the Iran-United States Claims Tribunal implicitly waived the rule, so that exceptionally significant international claims commission has not had to address the topic. Why, then, this book? What interest can it possibly hold for the general reader?

The answer to these questions is suggested in the book's subtitle, which incidentally is found not on its spine or introductory title page but only on its full title page (p. iii): "Its rationale in the international protection of individual rights." For, rather than a traditional treatment of the rule, Professor Trindade's book, as one might expect from the author of a series of articles on the exhaustion of local remedies under various international human rights regimes (see, e.g., p. 368 nn.246, 247), essentially concerns the application of the rule in the context of international human rights protec-

¹ Lauterpacht, *The Grotian Tradition in International Law*, reprinted in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 14-15 (R. Falk, F. Kratochwil & S. Mendlovitz eds. 1985).

tion. Indeed, aside from a short description of the practice of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities under ECOSOC Resolution 1503 (pp. 163–68), brief mention of the relevance of the rule to the work of the Human Rights Committee (p. 168) and the Committee on the Elimination of Racial Discrimination (pp. 168–69), and passing references to its impact in the inter-American system (see, e.g., pp. 168 and 235), Trindade focuses almost exclusively upon exhaustion of local remedies under the European Convention on Human Rights.

Had the book been given such a title, it probably would have sold more copies, since, as the reader soon realizes, it does not constitute a replowing of the entire field of exhaustion of local remedies theory and practice, which is suggested by its actual title and may deter potential readers, but instead considers at great length—indeed, some readers will consider at excessive length—the relevance of the rule to the international protection of human rights under the European system. This delimited topic, never handled adequately in the past, is of great interest to many international human rights scholars and practitioners in Europe and elsewhere. Moreover, the thesis developed by the author—namely, that the rationale of the rule mandates its more rigorous application in the diplomatic protection context than in the human rights protection context (see generally pp. 46–56)—warrants consideration by all international lawyers, especially in view of the impact that the author believes European Commission practice may have on general international law norms (pp. 108–10).

Trindade begins his keystone chapter 1 by noting that Article 26 of the European Convention on Human Rights, which provides, *inter alia*, that the Commission may deal with human rights matters only “after all domestic remedies have been exhausted, according to the generally recognized rules of international law,” was inserted at the last moment “with the express intention of *limiting* the application of the local remedies rule to exhaustion of domestic remedies which were available and effective, and without undue delays by national courts; and not with the intention of warranting a rigid interpretation and application of the rule” (p. 6). In the diplomatic protection context, he explains, “[t]he rule is in a way a ‘prophylactic’ device, in that, by insisting on prior settlement [*sic*] at local level, it reduces tension likely to arise in an inter-State dispute over injuries to nationals abroad” (p. 11). In the human rights context, however, where states are giving individuals direct access to international bodies as part of a new system to protect their rights, the reason for the rule is primarily practical—“to avoid the international organ from being ‘flooded’ with irrelevant complaints” (p. 3). Thus, the author argues convincingly, “there are no compelling reasons why the rule of exhaustion of local remedies should, in the framework of human rights protection, necessarily have the same application it has had in the system of diplomatic protection” (p. 37).

Although, as Trindade notes early on, “[a] mechanical transplantation of the rule from the older to the newer protection system would be likely to lead to an unwarranted rigidity in its application, tending to be destructive of the very purposes of securing an effective protection of human rights”

(p. 39), such arguments actually have been made (p. 41). Fortunately, as he points out, the "false analogy" (p. 42) has been rejected by the European Commission, which "has clearly drawn attention to the distinctive character of the system of human rights protection, at times opting for the non-application of the local remedies rule in such cases, and has excluded the possibility of any absolute parallelism with the system of diplomatic protection" (p. 44). Thus, Article 26 is not purely and simply a reproduction of the traditional exhaustion-of-local-remedies rule, but a more flexible variation in keeping with the human rights objectives enshrined in the European Convention.

The author, having established his thesis, tests it in chapters on conditions for the application of the rule, burden of proof with regard to exhaustion, the extent of application of the rule, the time factor in the application of the rule and further problems with respect to the rule's application. The discussion of the Commission's and Court's jurisprudence on these issues is exhaustive, revealing both a comprehensive survey of all case law—generally through 1976 and occasionally into 1981—and a wide familiarity with the literature in all the major European languages. Throughout, the author reveals a praiseworthy zeal for a flexible approach to the rule in the human rights context, "for tipping the balance in favor of the applicant, without necessarily detracting from general international law" (p. 233). "In the past twenty-five years," he acknowledges (citing data through 1976), "a great many applications under the European Convention have been rejected for non-compliance with the rule" (p. 285). Nevertheless, he detects "a new attitude towards the rule [that] may make States more inclined more frequently to waive formal objection to the admissibility of human rights applications" (*id.*). This more positive outlook he commends as "likely to lead to more reassuring results than the ones ensuing from an essentially negative or formalistic approach leading to systematic, if not mechanical, rejection of applications for non-exhaustion of local remedies" (p. 287).

In closing, two additional points need to be made. First, the author, in his preface, reveals that the book is an "abridged version" of a 15-chapter, 1,728-page Cambridge Ph.D. dissertation. In this reviewer's opinion, the editing has not produced a completely successful product. The book is too long for the topic it actually covers ("Exhaustion of Local Remedies under the European Convention on Human Rights"), frequently discursive and too often repetitive in its descriptions and comments (Trindade, the Thomas Wolfe of international law, would have benefited from the legal equivalent of the latter's Maxwell Perkins), and overdocumented to the point of pedantry (287 pages of text are accompanied by 1,623 footnotes—all unhappily occupying 125 pages at the end of the volume rather than appearing at the bottom of the page). These editorial shortcomings submerge the author's important thesis in a bog of detail and undoubtedly will restrict the book's readers to practitioners in search of legal precedents, a function not to be denigrated but nevertheless a disappointment in view of the vast amount of time the author obviously committed to this work. Even this function is not completely fulfilled, moreover, since in general there appears to be a 7-year

time gap between the termination of the research (1976) and the actual publication of the book (1983), though various portions suggest termination dates of 1973 (p. 297 n.71), 1976-1977 (p. 329 n.71) and 1981 (p. 409 n.2).

Second, on the plus side this time, is the fact that the book under review marks the beginning of a new series of Cambridge Studies in International and Comparative Law under the general editorship of Sir Robert Jennings. The original series, a most distinguished one, lapsed in the 1970s when the Cambridge University Press, in Sir Robert's words, "were persuaded that books on law should be left to commercial publishers" (p. vii). Happily, that decision has been rescinded and this volume—handsomely bound and attractively printed with only a handful of printer's or typographical errors—is the first in this new series. For all the reservations this reviewer has about the book—counsels of perfection, perhaps—it is overall a valuable addition to the literature on international human rights law and a worthwhile work with which to herald Cambridge's return to international law publishing.

RICHARD B. LILlich

Board of Editors

Power and Policy in Quest of Law: Essays in Honor of Eugene Victor Rostow. Edited by Myres S. McDougal and W. Michael Reisman. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xiv, 460. Index. Dfl.235; \$96; £59.75.

Collections of essays—*Festschriften*—such as this one in honor of Dean Rostow present an opportunity for his colleagues to address the principal themes of the work to which they and the man to be honored have been devoted. Rostow has had a distinguished and wide-ranging career both in public life and as an academic. He has served as Under Secretary of State for Political Affairs under President Johnson, special assistant to Secretary of State Dean Acheson, Dean and Professor of Law at Yale University, and professor and lecturer at numerous other schools.

The editors, three of Dean Rostow's closest friends and colleagues, have chosen four themes for this collection: jurisprudential perspectives, constitutional law, world public order and education. William Morison and Rostow's brother, Walt, have provided the essays on the first of these themes. Morison stresses Rostow's commitment to reasonableness—a principle that has given rise to standards and perspectives we associate with the development of law among and within states. Walt Rostow borrows for his contribution the title of his brother's work, *Planning for Freedom*, and in "an unauthorized and non-authoritative updating" observes that the book was suffused with the conviction of a liberal in the old sense: "a philosophy that puts the liberation and self-development of the individual as the first of our social goals." This essay concludes that continuing growth in a democratic economy such as ours calls for a "sense of communal purpose, transcending special interests, but consonant with them."

The second theme, constitutional law, is explored in six essays. Professor Strong strikes deep into substantive due process and its development. His essay focuses on the practice of the United States and is significant for a keen appreciation of the reach of our own law. It also has implications (not explored) for international law, as existing social orders are increasingly called into question by the mounting demand of human beings to be accorded human dignity.

Bishop, reviewing the "war power" of the United States, notes that our courts—particularly the Supreme Court—seek to prevent abuse by the executive and legislative branches when faced with emergency situations. When crises grow in intensity, Bishop reveals, the courts then tend to defer to the other two branches for their determination of the action needed to deal with the emergency. He thus reminds us, in an oblique way, of the problem that the International Court of Justice would face in conflicts or crises brought for legal resolution. In all such situations, the issues of necessity tend to displace the possibility of an effective judicial assessment of executive action among states.

The other three essays on constitutional themes are by Black, on the Ninth Amendment, by Blum, on American society during the Second World War (he reassesses behavior toward ethnic groups) and by Simson, on the role of history in constitutional interpretation.

The third theme, world public order, commences with an invaluable essay by the late Raymond Aron on the "politics of human rights." Aron argues that human rights become part of the world power process once we shift from concerns directly identified with human beings to concerns about nations themselves. Aron concludes that nations must choose their allies "in terms of national interest," and his examples suggest that the United States has chosen its allies among those that are opposed to communism. He then suggests that this may be an inadequate articulation of our nation's interest: "The United States competes with an ideocratic state that imposes a fictive unanimity and that suppresses personal and intellectual freedom but the United States discredits its own cause if it unscrupulously and indiscriminately supports any despotic state that declares itself anti-communist" (p. 243). And he adds to this theme:

Why should we worry about the internal regimes of our allies or of our enemies when in the last analysis all states in periods of crisis obey pragmatic rather than moral imperatives? . . . Diplomacy obeys neither the pure morality of responsibility nor the pure morality of belief. It can neither ignore the character of the internal regimes of other states nor subordinate its conduct to moral judgments concerning these regimes. . . . It would be illusory to hope that the United States could have for allies only states and not regimes or that it could support only regimes that respect human rights. . . . Inevitably hypocritical, each state fears the destabilization of its allies and hopes for the destabilization of its adversaries, and lives with the risk that events will confirm its fears and dash its hopes [pp. 242-44].

Lung-chu Chen looks at "human rights and the free flow of information," uncovering a link—and the necessity of that link—between the two. Chen's

analysis leads us toward what many of us believe to be the overriding element in the practice of states and with respect to the law shaping elements of that practice: "Without access to a flow of comprehensive, dependable and pertinent knowledge and information, rational decision making cannot be achieved in the power process, or in other value processes." Instead, decisions are arbitrary and power is uncurbed, among other things, in its control of information and significant information processes.

Errera examines in detail extradition under French law—a matter of accelerating importance in an era of growing terrorism. Bobbitt reviews "deterrence and American national security," but his definition of deterrence is framed in a deterrence calculus of decisions, aimed by the participants at influencing the decisions of their rivals and establishing costs with regard to future decisions, making some rational and some irrational. Clearly, this attempt at a definition reflects the goals of diplomacy in general and the objectives of states in their foreign affairs—deterrence is another way of describing one of the functions of influence.

However, with changes in state practice and changes in the strategic situation among states, we will be compelled under future state practice to explore how states are facing each other, and how they behave in unearthing new, exploitable events and opportunities. Definition is uncertain when we look to the changing framework of the risks, rationality and the decisional calculus. Most appropriately, deterrence is a sanctioning goal—future-oriented in nature.

Professors McDougal, Reisman and Willard have included an essay of such valuable insights that it deserves to be circulated and perhaps expanded for a wider number of readers. In succinct phrases, the authors encapsulate their thinking about the realities and necessities of state practice. In discussing the interaction of effective power and law, they offer a grim warning that only those with effective power will be enabled to determine the future and effectiveness of law: "it would be . . . wrong to ignore naked power in any scholarly inquiry or practical planning for decision making. Effective power, made authoritative, is a ubiquitous aspect of all social processes, an indispensable component of law" (p. 353).

Later, in a passage that, if expanded, would apply to deterrence, threat and defense, they look deeper into the risk calculus that was assessed by Bobbitt in the preceding essay:

The military instrument [as a strategic instrument of policy] is used even when weapons remain in the armory and troops in the garrison. As long as the availability of troops and weapons are perceived by other participants and taken into account in the formation of their own goals and their ongoing behavior, the military instrument is being used . . . [p. 376].

This passage echoes the perspectives of von Clausewitz, and the policy impact that reposes in military capabilities:

Combat [said von Clausewitz] is the only effective force in war; its aim is to destroy the enemy's forces as a means to a further end. That holds

good even if no actual fighting occurs, because the outcome rests on the assumption that if it came to fighting, the enemy would be destroyed.¹

The fourth theme is pursued in three articles—that of Fiss on law as it is taught at Yale, and by Pollak and Liebert in personal reflections about Dean Rostow. The book contains a bibliography of the substantial contributions—substantial both in number and quality—made by Dean Rostow. With this collection Rostow's contributions have become a part of our common heritage to which we can reach for our enlightenment.

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Die Anwendbarkeit des humanitären Völkerrechts, insbesondere in gemischten Konflikten. By Martin Hess. Zurich: Schulthess Polygraphischer Verlag, 1985. Pp. xxv, 286. Sw.F.45, paper.

This scholarly study¹ examines in detail the applicability of the rules of humanitarian international law to so-called mixed conflicts. The latter are defined as armed contention among the forces of at least three parties, two of which are representatives of the same territory whose boundaries have been defined in accordance with accepted rules of international law. At least one of these two representatives carries on the conflict jointly with troops of a foreign state.

First, the author briefly discusses the basic concept and development of humanitarian international law, emphasizing that an armed conflict represents a basic prerequisite for the application of such law. This introductory portion of the work is followed by a carefully detailed analysis of the legal norms applicable to international armed conflicts, noninternational armed conflicts and mixed armed conflicts. The Hague and Geneva Conventions, the Geneva Protocol of 1925, the two 1977 Protocols and relevant rules of customary international law are examined in meticulous fashion, as is the specific practice of states in adhering to these legal restraints on the use of armed force. A valuable aspect of this analysis is Hess's examination of the "component theory" relating to mixed conflicts. The author correctly points out the basic weakness of that theory, namely, the difficulty of deciding which of the parties involved is entitled to be regarded as the representative of the state in which the mixed conflict takes place: the legal capacity or standing of the parties to the conflict.

The final portion of the work (pp. 193–278) covers the applicability and observance of humanitarian international law in mixed conflicts in Afghanistan, Angola, Kampuchea, Lebanon and Chad (in all instances to February

¹ C. VON CLAUSEWITZ, ON WAR 97 (M. Howard & P. Paret eds./trans. 1976).

¹ Doctoral dissertation, University of Zurich: volume 39 of Swiss Studies in International Law, published by the Swiss Society of International Law.

1984). Each of the five case studies begins with a brief résumé of the background, followed by a description of the views concerning the applicability of rules of the International Committee of the Red Cross (ICRC), the parties to the conflict and the United Nations. Hess then describes the behavior of the parties to the conflict toward the protected persons in that struggle, and concludes with a brief account of the methods of warfare (including weaponry) utilized by the various parties involved.

The author views the conflict in Afghanistan as an instance of Soviet intervention in a civil war in favor of the established (recognized) government. He states that the legal norms only applicable to international conflicts were disregarded and that the relevant Article 3 of the fourth Geneva Convention of 1949 was violated repeatedly by all contending parties in Afghanistan.

In the case of Angola, the author points out that it is not clear whether the MPLA (the Popular Movement for the Liberation of Angola) Government has ever effectively controlled the entire territory of the country but that it has been recognized as the legitimate authority by most outside states. He also mentions that neither the Government nor its UNITA (National Union for the Total Independence of Angola) opponents have thus far formally accepted the Hague and Geneva Conventions: the Angolan Government apparently has adhered to the "clean slate" principle concerning any previous Portuguese treaty obligations. On the other hand, the author says nothing about the generally accepted interpretation that the 1907 Hague Regulations represent binding obligations of customary international law. He maintains, instead, that only common Article 3 of the 1949 Geneva Conventions applies to the Angolan conflict; that the civilian population of Angola is protected by that common article as far as activities of Cuban troops are concerned; and that in any combat operations between Cuban and South African forces the entire corpus of humanitarian international law would be applicable because both countries in question are parties to the Hague and Geneva instruments.

The conflict in Kampuchea is viewed by the author as having developed in two stages. In the first, up to the defeat of the Khmer Rouge, there was no question about the applicability of humanitarian international law: it was an international armed conflict. In the subsequent phase, until now, Hess asserts, Vietnam clearly has governed the country *de facto* and the official Kampuchean Government has been totally dependent on Vietnam. The opponents of that Government formed a coalition of dubious viability under pressure from China and the ASEAN states, to protect the UN seat of "Democratic Kampuchea." The latter has been recognized by the United Nations, China, North Korea and the ASEAN states as the legitimate Government of Kampuchea. The author holds that the conflict must be regarded as an international armed conflict, but that since Kampuchea has not ratified Protocol I of 1977, Vietnamese forces are bound to grant prisoner-of-war status only to combatants of "Democratic Kampuchea" who have fought in regular units.

The Lebanese situation is analyzed by the author in the light of the interventions by Syria and by Israel. He emphasizes that in the Lebanese civil

war the theory that the right of representation is assumed to belong to the established government cannot be applied: the formally *de jure* government has lacked effectiveness. Hess holds that at least since the disintegration of the Lebanese Army in the spring of 1976, Lebanon has not been able to demonstrate the existence of an organ that could be viewed as constituting a government in accordance with the customs and rules of international law. He views the subsequent "official" government as a local *de facto* regime. Hence, he regards the Syrian forces stationed in Lebanon as an army of occupation, bound vis-à-vis the Lebanese population by the provisions of the fourth Geneva Convention of 1949. On the other hand, the author states, the various Lebanese factions do not feel bound by any provisions of humanitarian international law entered into by the official government. Thus, in view of the noninternational character of the civil war, Article 3 of the four Geneva Conventions of 1949 should be seen as applicable. As far as Israel's incursion into Lebanon is concerned, Hess points out that, according to the ICRC, an instance of international armed conflict did take place; hence, the 1949 Geneva Conventions should have applied in that regard.

The conflict in Chad is also viewed by the author as having taken place in two stages, the first lasting from 1965 to 1979, the second since 1981. From a factual point of view, according to Hess, Chad has been divided into two parts since the end of 1983, with the north governed by a "rebel" government shored up by Libyan forces and the south ruled by a "legitimate" government supported by French ground forces or, at times, by French air power alone.

The author asserts that during the first phase of the conflict, common Article 3 of the 1949 Geneva Conventions represented the applicable rule of international law. The second phase, in which warring factions are coupled with outside intervention, is likened by him to the situation in Lebanon, with both "governments" being characterized as at best local *de facto* regimes. According to him, neither Libya nor France (nor Zaire) could justify its intervention on the basis of agreement by an established legitimate government. He concludes that the parties to the conflict paid no attention to the differences between the legal norms applicable in international and in noninternational armed conflicts.

The author, after reviewing the dismal record of adherence to the rules of humanitarian international law in mixed conflicts, comes to the conclusion that the applicable rules have to be simplified—if only so that individual participants in such conflicts might acquire some knowledge and understanding of the rules and that those rules might be accepted by the various parties to mixed conflicts. He endorses strongly the 1978 Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts of the ICRC² and suggests several additional "desirable" rules such as the collective

² Règles fondamentales du droit international humanitaire applicables dans les conflits armés, reproduced in French in the book under review at p. 286; reprinted in English in INT'L REV. RED CROSS, No. 206, Sept.-Oct. 1978, at 248-49, and in DOCUMENTS ON THE LAWS OF WAR 466 (A. Roberts & R. Guelff eds. 1982).

regulation of the recognition of governments, which would eliminate the political aspect based on the individual decisions of states; conventional law restrictions on the concept and permissibility of intervention; and new limitations on the legal position and rights of troops stationed in a foreign state. The last of these suggestions is to include an obligation toward the civilian population, that under all conditions the rules of the fourth Geneva Convention of 1949 and of part IV of Protocol I of 1977 must be respected, even if the presence of the armed forces is based on the agreement of the host state.

This reviewer seriously questions not only the acceptability of the "Fundamental Rules," which represent merely a set of nonbinding recommendations from the ICRC, to parties to mixed conflicts, but also the acceptability of the author's additional suggested revisions of international legal norms and customs. Despite this discouraging view of the author's conclusions, this reviewer feels that the work represents a well-thought-out investigation into one of the murkier aspects of the rules governing armed conflicts, one that merits further analysis from a somewhat less academic point of view.

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Europäische MenschenRechtsKonvention: EMRK Kommentar. By Jochen Abr. Frowein and Wolfgang Peukert. Kehl am Rhein, Strasbourg and Arlington: N. P. Engel Verlag, 1985. Pp. 604. DM 188.

The human rights system established by the European Convention of Human Rights has been in existence for more than 30 years. In these three decades, its membership has grown from 10 states to 21. The treaty, once perceived as a daring experiment of limited significance, has become a veritable Magna Carta of Western Europe. The institutions established to enforce the rights it guarantees—the European Commission and Court of Human Rights—have also undergone a significant change. Conceived as regional international organs with limited jurisdiction and even more limited powers, they have gradually acquired the status and authority of constitutional tribunals. This transformation of the Convention and its institutions, a process that has by no means reached its final stage, marks a fascinating chapter in the evolution of modern international law. The book under review does not deal with this subject expressly. One cannot read it, however, without noting that, to the authors, the transformation of the Convention and its institutions is a reality to be taken for granted, which it is in Western Europe and which demonstrates how much progress has already been made.

This book provides an article-by-article analysis of the Convention and of its Additional Protocols, which are the instruments that are utilized to expand its catalog of rights and improve its institutional structure. The work discusses the case law of the European Commission and Court as well as important national court decisions. One of the authors, Professor J. A. Frowein, is a Vice President of the Commission; the other, Dr. W. Peukert,

is on its staff.¹ They have consequently been involved in the process of interpreting and applying much of the law they analyze and bring to their subject an impressive understanding of the practice of the Convention institutions. The authors have not, however, written a practitioner's handbook; they have produced a sound, scholarly commentary in which the Convention and its case law are thoroughly and critically analyzed and in which the conceptual and institutional needs of the Convention system are treated with perception and imagination.

The European Convention contains many provisions that are identical to or resemble those found in the International Covenant on Civil and Political Rights and in the American Convention on Human Rights. The extensive case law bearing on the application and interpretation of the European Convention, which this book deals with, consequently has a relevance for an understanding not only of the Convention but also of the international law of human rights in general. This jurisprudence gains even greater significance when it is remembered that other international human rights bodies have thus far not had the opportunity to develop an equally important body of law.

Particularly useful, in this connection, is the authors' exhaustive review of the practice of the Convention institutions interpreting the due process provisions of the European Convention (Articles 5 and 6). Since similar provisions are found in the Covenant and the American Convention, this section has a special value as resource material for comparative analysis of these rights.² The same is true of the perceptive treatment of the case law relating to some of the traditional civil liberties guaranteed in Articles 8 through 11 of the Convention (right to privacy and family life, freedom of thought, conscience and religion, freedom of expression and of assembly). Under the Convention, these rights are not absolute and may be limited in certain defined circumstances. For example, the limits must be "prescribed by law" and, *inter alia*, be "necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals." The meaning of these and similar concepts, which are repeated in various other human rights treaties, has been analyzed by the European Convention institutions in a number of important cases. Although these cases have not resolved all the questions bearing on this difficult subject, the insightful manner in which these provisions are analyzed in this book should prove invaluable to anyone seeking to understand the issues they raise. By contrast, the chapter dealing with the requirement for the exhaustion of domestic remedies—a subject of great importance in international human rights litigation—is disappointing. More often than not, it consists of a string of abstract rules that are either inadequately or not at all related to the facts

¹ Each author wrote different sections of the book, which are attributed accordingly in the section headings.

² These due process provisions, it should be noted, have been most widely invoked under the European Convention system, which explains why the authors devote some 140 pages to these two articles; the remaining provisions of the Convention are usually dealt with in this book in 10–20 pages each.

that resulted in their formulation. Most of the other chapters do not, however, suffer from the same defect.

All in all, this is by far the most comprehensive treatment to date of the law of the European Convention and, for that reason alone, constitutes an important contribution to the human rights literature. The extensive bibliographic and statistical information it contains enhance the usefulness of this volume. Its high quality and special value as a resource for the comparative study of human rights law justify this expression of hope for the publication of an English-language edition of the book.

THOMAS BUERGENTHAL
Board of Editors

Friedliche Erledigung von Streitigkeiten nach dem System der Vereinten Nationen.

By Regina Escher. Zurich: Schulthess Polygraphischer Verlag, 1985.
Pp. xx, 185. Sw.F.40, paper.

This is predominantly an eclectic study of the UN Security Council's authority and procedure in the context of chapter VI of the UN Charter, although there are also briefer sections devoted to procedure in the General Assembly, the "good offices" of the Secretary-General and the duties of the members in the field of pacific settlement of international disputes. The field is defined strictly, leaving out the panoply of creative, chapter VI-and-a-half operations described in Hammarskjöld's theory of preventive diplomacy; and the term "peacekeeping" appears only to distinguish enforcement measures from "peacemaking" or dispute settlement according to pre-Hammarskjöld terminology. Consistent with this, the interrelationship with chapter VII is reduced to the view that its ineffectiveness leaves pacific settlement without a safety net.

Within this scope, the author sets ambitious goals for herself. She wants to "present the way the UN system of dispute settlement functions" and also to "pursue the question why the system was incapable of solving so many grave interstate conflicts." This is to be accomplished by (1) an investigation into whether the Charter imposes an obligation upon the members to settle their disputes (*sic*); (2) an analysis of the procedures before the UN organs; and (3) an evaluation of results, in order to point up possible improvements.

With such a plan, the author was bound to have some problems. For one thing, the debates and resolutions of the Security Council and the General Assembly rarely place their subject matter into neat legal categories (ch. VI vs. ch. VII, Art. 36 vs. Art. 40, etc.); indeed, in most cases they refer to general principles, leaving it open under which operational article the organ is "recommending," "calling," "urging," "insisting" or even "deciding" that something be done or omitted. For another, a presentation of the actual functioning of the system and of its results, as distinct from a deductive interpretation of its provisions and requirements, would impose a much broader investigation into the accumulated case materials than the author could afford in a concise monograph series. Moreover, she aggravates her problem by using "pacific settlement of disputes" (*friedliche Erledigung der*

Streitigkeiten), "resolution of conflict" (*Konfliktlösung*) and "elimination of causes of conflict" (*Beseitigung der Konfliktursachen*) interchangeably. It is clear that even the most careful legal analysis of the procedure for the first can barely scratch the surface of the problems involved in the latter two, at least in their conventional meaning.

Escher does draw frequently on a limited number of cases to illustrate her interpretations or those of other legal scholars, but such selective references, combined with the inconsistent practice of UN organs themselves, are unhelpful in discovering any patterns in the UN practice that could resolve the controversial legal issues or reveal how the UN system really works. By way of contrast, the available literature on key concepts and rules is extensively quoted and demonstrates vividly the variety of plausible but conflicting interpretations of the Charter. In general, Escher sides with the positivists and the strict constructionists, for example, in tracing international obligations to previous consent as their sole possible source, assigning to Article 2, paragraph 7 (exclusion of matters of domestic jurisdiction) a greater significance than the UN practice warrants, denying any legal effect to mere recommendations of the Security Council and insisting upon a substantive distinction between justiciable and nonjusticiable disputes. There are surprises, however, such as when both bilateral settlement and Security Council recommendations are considered to be limited by the principle of justice in Articles 1 and 2—operationally an admittedly unworkable requirement.

In her overall evaluation of the system, Escher finds it hardly possible to determine whether states have been at all influenced by the Charter prescription of pacific settlement of disputes, as some of them continue to consider the use or threat of force as the most suitable means of resolving their international conflicts; this is blamed on the lack of a mechanism for the implementation of the rules of Article 2, paragraph 3 and Article 33, paragraph 1. As for the "obligatory political procedure" before the Security Council, any potential benefit of bringing the matter into the open in that forum and any hypothetical impact of the power of the five permanent members when they act in agreement with each other stand in stark contrast to the "widespread ineffectiveness of the resolutions in practice." The General Assembly meanwhile suffers from lack of both political weight (major powers need not be unanimous) and serious intentions (resolutions have propagandistic rather than dispute settlement goals), and the consequences of its activities are therefore "predominantly negative." Finally, the decisions of the ICJ are "neither quantitatively nor qualitatively very important" (few important cases are brought before it and there are also various defects in its operation); and while the "quiet approach" of the Secretary-General could be advantageous, its success depends on the willingness of the parties to agree since he does not have a power base of his own. The main responsibility for the lack of success of the UN system, however, lies "with those states that do not strive for settlement of disputes, whether in their capacity as disputants or as members of the political organs of the United Nations."

So what is to be done about it? Escher tries to improve upon the Clark and Sohn model but drops it eventually on the ground that in the present world of sovereign states "it is inadmissible for a majority—or even a to-

tality—of other countries to impose upon the parties to a conflict a revision of their legal situation.” She then considers the proposal of the Swiss delegation at the Helsinki Conference for a European system of dispute settlement and tries to adapt it to the global level. (The proposal requires the obligatory submission of justiciable disputes to an arbitral tribunal and of nonjusticiable disputes to a conciliation commission, both bodies being composed of independent individuals rather than government representatives. But conciliation remains conciliation, i.e., as much, if not more, dependent on acceptance by the parties as on UN procedures. Moreover, Escher doubts that it could be adopted without an exception for the case where the dispute affects the vital interest of a disputant, which she rejects, because it would drain it of all meaningful content.) Finally, the author offers a plan of improvements under the present rules, such as involvement of the Security Council in early stages of disputes (before they have escalated to the status of a potential threat to peace); inclusion of substantive suggestions with Security Council recommendations of procedures or methods of adjustment; greater use of third parties, including good offices of the Secretary-General and conciliation by independent individuals on the Swiss proposal model; and greater specificity in the Security Council’s substantive recommendations. Escher would also reduce the number of public sessions of the Council and the number of invitations extended to nonmembers of the Council, but would not tinker with the veto. Even so, she remains skeptical about the possibility of adoption of her own, relatively modest, proposals.

Does it make sense to propose reforms that are unlikely to be adopted? The author answers in the positive. The proposals force governments to contemplate the problem and to take positions; with time, thinking about pacific settlement of disputes may lead to the realization that there is no other way towards peace. Moreover, while the adoption of more effective mechanisms for conflict resolution may depend on a reduction of interstate tensions, more effective mechanisms would lead to the defusing of interstate relations. Perhaps. But this is not a chicken-and-egg question. As Escher admits, the primary blame belongs to states. When members were willing in the past, they found a way around the limiting Charter provisions (though in areas, such as peacekeeping, that are outside this study). The effectiveness of the system depends first of all on the willingness of the members to use it and the quality of their diplomacy in using it. Given that, procedural improvements would inevitably follow.

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Dilemmas of Economic Coercion: Sanctions in World Politics. Edited by Miroslav Nincic and Peter Wallensteen. New York: Praeger Publishers, 1983. Pp. 250. Index. \$28.95.

Since the end of the last world war, economic coercion has assumed some importance in world politics. The eight essays in this book examine in some

detail certain aspects of the dilemmas posed by this new development in international politics and diplomacy. Chapter 1, written by the two eminent scholars who edited the book, deals with "Economic Coercion and Foreign Policy." While pointing out that economic sanctions imposed by some nations on others are sometimes used to influence the policies of those states, the authors remind readers that such sanctions often result in what appear to be failures. In spite of these apparent failures, the writers predict, correctly, that the circumstances that have made sanctions an increasingly used tool of foreign policy are likely to exist during coming decades.

Using Rhodesia (as Zimbabwe was formerly called) as an example, Professor Galtung in chapter 2 discusses the effects of international economic sanctions. After careful analysis, he concludes that the "effectiveness of economic sanctions is, generally, negative" because as an organism with a certain self-maintaining potential, the target society, when hit and hurt, usually tries to undo the damage and to restore the status quo ante. However, it has now become abundantly clear that there is always a limit beyond which the self-maintaining potential cannot operate.

Using Cuba, Israel and Rhodesia as case studies in strategies for evading economic sanctions, Jerrold Green points out in chapter 3 that those powers that assisted in such evasion strategies—the USSR, the United States and South Africa, respectively—did not offer that assistance out of altruism but from pragmatic and topical calculations that it would advance the evader's own interest. What emerged from the study, according to Green, was that as a result of such assistance the anticipated sanctions were aborted. In his own study, based upon 10 cases of the imposition of economic sanctions between 1932 and 1980, Peter Wallensteen (ch. 4) concludes that historically economic sanctions tend to be unsuccessful; that the imposition of such sanctions has not arisen from a nonviolent philosophy and that for small states they have often grown out of the lack of military means; and that if effectively and prudently used, economic sanctions could play a role in making international relations less brutal.

In chapter 7, David Gordon once again turns attention to South Africa. Hitherto Western diplomats and writers had been virtually unanimous in asserting South Africa's economic autonomy and invulnerability, but according to Gordon such an image is a myth; and Gordon has been proved right by more recent events.

Robert Paarlberg in chapter 5 is concerned mainly with food power strategies open to the United States but concludes by expressing a reservation about the use of food as an effective weapon of coercion. In chapter 6, David Deese critically examines the application of economic diplomacy in East-West relations from about 1967 to 1982. Although he believes that economic coercion is potentially an effective element of foreign policy and grand strategy, it may accelerate the use of military force and the outbreak of conflict if not carefully planned, timed and executed.

Frequent calls are made for the punishment of certain states for alleged international crimes by the application of economic sanctions. However, opponents of such sanctions often argue that at best they are useless, and at

worst self-defeating. David Sylvan in chapter 8 sets out to provide a new perspective on the issues connected with these opposing stances. He does so by carefully examining the cases of Iran, Nicaragua and Cuba, and he concludes that "to persist at this late date in separating economic sanctions from the gamut of other punitive activities carried out in international relations is to be not only scholarly insensitive, but politically naive and morally obtuse" (p. 237).

The standard of scholarship is uniformly high throughout the book. There is much in it that must serve as a lesson to both the powerful nations of the world and the Third World countries in their quest for the use of economic coercion as a means of achieving goals that they may consider ideologically or politically desirable.

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International Security in the Southeast Asian and Southwest Pacific Region. Edited by T. B. Millar. St. Lucia, London, New York: University of Queensland Press, 1983. Pp. xiii, 317. Index. \$24.95.

This is a very useful collection of essays edited by Dr. T. B. Millar, Professorial Fellow in International Relations, the Australian National University, who founded its Strategic and Defence Studies Centre. In this volume, a group of experts have revised and in some cases updated their papers from a conference conducted by the Strategic and Defence Studies Centre in Canberra in July 1982. The conference was organized by Dr. Robert O'Neill before his appointment to London as Director of the International Institute for Strategic Studies.

The region chosen for the study is important, as O'Neill indicates in his conclusion. It covers about one-sixth of the earth's surface, contains more than three hundred million people and is an area of rapid development. It harbors major sea communication networks and is fortunate to be out of the main zones of contention between the superpowers. Initially, a reader from outside this region might wonder at its geographic delimitation as including both Southeast Asia and the southwest Pacific. A glance at the map of the principal Soviet and U.S. bases and facilities there (p. 236) will provide an explanation. Australia is virtually central to the map and the commentator from Australia would tend to see the region as one. The map will also indicate the utility of adopting this arbitrary delimitation of the region. It permits the consideration of security problems against the background of the interests of the world's superpowers, which are essentially global and not limited to any one single region. Thus, the map shows us the Soviet facilities at Cam Ranh Bay and Da Nang, and the major U.S. facilities at Guam, in the Philippines, at Diego Garcia and in Australia. In addition, it becomes apparent that the region is mostly sea, and thus the importance of U.S. and Soviet naval activities in the area may be stressed as well as of the vast commercial maritime networks that converge there.

The contributors essentially see four major external powers as having

interests and capabilities in the region: the United States, the Soviet Union, China and Japan. Moreover, although it does not merit a separate chapter, Stuart McMillan in his essay, *The View from Wellington*, notes the important role of France in its overseas territories, and the fact that France continues to conduct nuclear tests in the Pacific. There is also a minor residual British interest, now mainly superseded by the various Commonwealth powers in the region, particularly Australia and New Zealand. Sheldon Simon argues that there is a lack of coherent American policy for the region as a whole, but as Desmond Ball and Paul Dibb indicate, American strategic power in the region is formidable. Dibb is also certain that the Soviet Union is in the region to stay. Indeed, he argues that if Vietnam were weaned away from the USSR, "Moscow would look around for other soft spots in the region to make up for the loss of such a valuable client" (p. 72). However, he does not see the USSR as being a direct military threat to the region in the next decade; its main threat would be through political subversion in the ASEAN countries and the southwest Pacific and the supply of arms to Indonesia. O'Neill does make the point that in dealing with the Soviet Union there is one advantage, which is that power is not diffused in the Soviet body politic as it is in the United States. The difficulties of negotiating with the United States, where policymaking is so often decentralized, are, of course, experienced by all foreign ministers and heads of government who go to Washington; it should, however, be stressed that the difficulties of obtaining firm assurances and avoiding sudden changes of policy are very much increased by the American system in which the many organs of government—the White House, the State Department, the National Security Council, the Pentagon, the two branches of the legislature, etc.—make the process somewhat Byzantine.

As for China, Wang Gungwu makes the interesting point that it is ironic and interesting that China is closer today than anyone expected to the kind of country each of the great powers would have liked to have supported earlier this century: stable, orderly, with enough strength to control domestic revolutionary forces—yet also, of course, of limited strength externally. O'Neill concludes that it is better for China to seek influence by political and economic means than by military means. As he notes, Japan has long understood this requirement and shows little sign of departing from it.

What of the regional powers? A major cause for concern for the Association of South-East Asian Nations (ASEAN) is the intervention by Vietnam in Kampuchea. In addition, there is concern regarding the internal situation in Vietnam. Apart from this, the situation in Southeast Asia remains relatively stable. As Kernial Sandhu observes in his overview, *Stability and Security in the Region in the 1980's*, all indications are that the well-being and progress of the region will be largely determined not so much by its military affairs as by its ability to bring about necessary and continuing development. This is stressed by K. Snitwongse in his chapter on the internal problems of the ASEAN states when he says that their economic performances are still impressive, but the maintenance of political stability will continue to be a major, if not the greatest, concern of the leadership. The recent events in the Phil-

ippines lend support to this view. In addition, it is clear that the management of ethnic tension and conflict will be more difficult, a problem seen in a number of states in the region and, indeed, in the world.

The book was published before many of the recent events in the region took place, in particular the contretemps between New Zealand and Washington concerning the visits of nuclear-armed and/or nuclear-powered vessels, and the sinking of the *Rainbow Warrior* in New Zealand waters by French agents. There have been the change of government in the Philippines, the continuing border difficulties between Indonesia and Papua New Guinea, and the somewhat inexplicable war of words that erupted between Indonesia and Australia when an Australian newspaper printed an article that, in the view of the Indonesian authorities, libeled the Indonesian First Family. Also, there is the treaty, still in draft form, establishing the Pacific as a non-nuclear zone. None of these events, however, has in any way dated the underlying themes put forward by this eminent group of contributors.

This book and the conference that preceded it constitute an important contribution towards the study of security issues in the region. The book contains a collection of very useful facts, but more significantly, it contains the views of some very learned commentators on this important part of the world.

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National Security Interests in the Pacific Basin. Edited by Claude A. Buss. Stanford: Hoover Institution Press, Stanford University, 1985. Pp. xxii, 317. Index. \$19.95.

It embraces the small but important mid-ocean islands and extends in a kind of ellipse from Australia and New Zealand in the Southwest, up the coast of East Asia to the island chains of the Kuriles and the Aleutians and down the west coasts of Canada and the United States, thence along the Latin American littoral to Tierra del Fuego [p. xii].

Identifying the Pacific Basin as an exclusive political region, the Hoover Institution held a conference in August 1983 in response to a perceived threat of Soviet encroachment there.

The conferees took it as a foregone conclusion that world domination has been and always will be the Soviets' objective, as confirmed by their movement of troops into Afghanistan. The Pacific Basin was seen as a region of special concern, following the Soviets' conclusion of a treaty of friendship and mutual cooperation with Vietnam¹ and the buildup of the Soviet navy in the Pacific Ocean.² A central theme of the conference was that, given the

¹ See Treaty of Friendship and Co-operation between the Socialist Republic of Viet Nam and the Union of Soviet Socialist Republics, Nov. 3, 1978, 17 ILM 1485 (1978).

² "Most ominous for the West is the expanding role of Siberia and the Soviet Far East in the Soviet Union's massive strategic military buildup" (p. 56, remarks of Rodger Swearingen from the book under review).

global networks of the United States and the Soviet Union, no conflict could be resolved in the Pacific Basin without reference to the interests of both nations.

Against such a "superpower confrontation" backdrop, the conferees identified and analyzed subregional issues in the context of international politics with virtually no reference to the international legal system.³ Rather, it was presumed that "a balance of power is the arbiter of peace" (p. xii), suggesting that only diplomatic, economic and military maneuvering can be effective.

If the reader accepts, or otherwise can tolerate, treatment of national security issues within a superpower confrontation framework in which international lawyers are superfluous, this book offers a politically informative collection of 40-odd presentations derived from an ingathering of notables⁴ in the field of international relations.

The presentations are divided into four categories; they provide the reader with a bird's-eye view of the superpower confrontation as it affects U.S. "allies and friends" in four subregions within the Pacific Basin: Northeast Asia (Japan and the Republic of Korea [South Korea]), ANZUS (Australia and New Zealand), ASEAN (Malaysia, the Philippines, Indonesia, Thailand, Singapore and Brunei) and the "two Chinas" (the People's Republic of China [PRC] and the Republic of China [Taiwan]). There is no mention of the roles of Canada, Latin America and Micronesia. This is a disappointment, in view of Soviet support for Nicaragua (-on-the-Pacific), whose alleged export of revolution could upset the balance of power throughout Latin America, and in view of the recent grant of (virtual) independence to Micronesia and the Marshall Islands;⁵ those newly sovereign nations strategically span a vast area of the South Pacific, and they are now free to "choose up sides" in the "Great Superpower Confrontation in the Pacific Basin" (the title of B. R. Inman's presentation, p. 16).

³ *But see* remarks of Birabhongse Kasemsri:

[W]e should consider the relevance of other issues. These would include, first, the legal framework for avoidance of conflict and peaceful settlement of disputes within the region.

...

Second, the Law of the Sea could play an important role. . . . These . . . sensitive issues . . . could be potential sources of conflict. We have within the region an anomalous situation since the United States refused to sign the convention on the Law of the Sea. . . . [p. 238].

⁴ "The list of participants reads like a 'Who's Who' of political science, strategic studies, and international relations. . . ." (p. 214, remarks of Sukhumband Paribatra).

⁵ At the time of the conference, a "Compact of Free Association" had already been drafted. Reprinted in 131 CONG. REC. S15,610 (daily ed. Nov. 14, 1985). The Compact restored limited independence to two thousand Pacific islands, terminating the last of 11 trusteeships assigned to the United States as part of the general settlement ending World War II. See Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, TIAS No. 1665.

After the conference, in January 1986, the Compact was adopted by the United States as Public Law No. 99-239. See 132 CONG. REC. D17 (daily ed. Jan. 21, 1986). The effective dates were established on November 3, 1986. Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986).

Claude Buss, the editor, expressed concern that in Northeast Asia there is a "gap of perception of superpower confrontation" (p. 47), especially between the United States and Japan, which believes that the superpowers create tension that would not otherwise be. The United States, on the other hand, would have Japan share more fairly in the cost of mutual defense, "because, like it or not, the ultimate power in world politics is military power."⁶ Rather than paying attention to its role as a democratic actor in the U.S. design for mutual security, especially when it concerns the security of Japan,⁷ South Korea was said to be distracted, even "obsessed," by the threat of a North Korean invasion, which has caused its domestic economic and political systems to suffer; more than one-third of its national budget is appropriated to defense, and many South Koreans oppose President Chun's authoritarian administration.

In the Southwest Pacific, Australia and New Zealand were considered to be more perceptive of the Soviets' aims. It is only New Zealand's bitter antinuclear stance that is a thorn in the side of the United States. New Zealand even forbids entry of nuclear-armed vessels into its ports. At the time of the conference, it was recognized that although New Zealand tolerated the U.S. policy of "no confirmation, no denial," a New Zealander Labor Government would probably be less tolerant.⁸ Indeed, early in 1985, Prime Minister David Lange refused to allow a U.S. Navy ship to make a port call because the United States would not guarantee that it was nuclear-free. At stake is the future of U.S. commitments to New Zealand under ANZUS, the 1951 mutual security treaty among Australia, New Zealand and the United States.⁹

In Southeast Asia, the conferees pointed out, ASEAN (the Association of South-East Asian Nations)¹⁰ chiefly focuses its political attention on Vietnam.¹¹ Although this attention is compatible with the U.S. posture toward the Soviets, certain conferees expressed concern because ASEAN members were pressuring the United States to spend less on military defense and

⁶ P. 100 (remarks of Tadae Takubo). Also consider Yoichi Masuzoe's remarks (p. 60): "The greater the U.S. trade deficit with Japan, the louder American business and political leaders complain that Japan is fattening its prosperity by leaving defense to the American taxpayer."

⁷ "[South Korea wants] to be recognized not merely as a flank to protect Japan, but as an important adjunct" (p. 48, remarks of the editor).

⁸ Remarks of Henry S. Albinski, at p. 129.

⁹ Security Treaty between Australia, New Zealand, and the United States, Apr. 29, 1952, 3 UST 3420, TIAS No. 2493. See also the South Pacific Nuclear Free Zone Treaty, *opened for signature* Aug. 6, 1985, 24 ILM 1440 (1985) (already signed by Australia and New Zealand). Article 5(2) states: "Each Party in the exercise of its sovereign rights remains free to decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields. . . ." (*id.* at 1446).

However, Henry S. Albinski states: "Washington feels that the Darwin B-52 transit agreement with Australia as a model for ship visits to New Zealand is inapplicable, and the United States is unprepared to change the rules for New Zealand" (p. 130).

¹⁰ Association of Southeast Asian Nations Declaration, Aug. 8, 1967, 6 ILM 1233 (1967) (Brunei joined after its independence in 1984).

¹¹ "Vietnam, as far as ASEAN is concerned, is a security sword cutting both ways. A sick Vietnam is a weakened and preoccupied Vietnam, hence less of a threat to its neighbors but also unstable and unpredictable" (p. 190, remarks of Douglas Pike).

more on development assistance.¹² No papers were presented on the situation of Brunei, perhaps because of its small size and because, at the time of the conference, it was not yet a sovereign nation.¹³ Also, at the time of the conference, Philippine President Marcos's ouster was not foreseeable as imminent.¹⁴ No doubt the conferees would have mentioned, as they did with respect to Pacific Basin nations in general,¹⁵ the need for the United States to provide support without interfering in internal affairs.

The final section of this book examines the anomalous situation of U.S. relations with the PRC and Taiwan. The issue of Taiwan's status is cited by Buss as "the darkest cloud on the security horizon of the Western Pacific" (p. 252). While Taiwan may be the "unsinkable aircraft carrier" of the United States, as characterized by General MacArthur, it is in the U.S. interest "to contribute to [the PRC's] economic health and prosperity" (p. 254), because the PRC opposes the hegemonism of the Soviet Union.

After reading this book's series of brief analyses, the reader may feel that a two-way path of understanding has been cleared, but with inadequate discussion of how the United States should strive to satisfy the special concerns of each subregion—especially New Zealand's antinuclear stance and ASEAN's Third World concerns in such areas as the law of the sea,¹⁶ the "New International Economic Order" and the refugee problem (mentioned briefly by Kasemsri, p. 238).

Editor Buss states: "Hostilities are not likely to occur in the vast Pacific except as a consequence of wars started outside the region" (p. xiv). Nevertheless, it will be worthwhile to observe closely the evolution of U.S. opposition to Nicaragua; the alignment of the newly independent nations of the South Pacific; whether the United States will abandon its ANZUS commitments to New Zealand; events leading up to the 1988 Olympic Games in Seoul, South Korea (for example, will the PRC participate?); whether military base agreements will be renewed by the new Government of the Philippines in 1991;¹⁷ and the situation in Hong Kong after 1997.¹⁸

SAMUEL BETTWY

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¹² "[T]he pace of national economic and social development is such as to require a concentrated and sustained commitment, particularly since time is not in our favor" (p. 236, remarks of Birabhongse Kasemsri).

¹³ Independence was granted by Great Britain to the Sultanate of Brunei on Jan. 1, 1984, after 96 years as a protectorate.

¹⁴ "I am . . . suggesting that [the United States] do something so that a Khomeini will not succeed Marcos in the Philippines" (p. 243, remarks of Salvador P. Lopez).

¹⁵ "How can Americans proffer advice without appearing to interfere in internal affairs?" (p. xvii).

¹⁶ *But see* the remarks of Birabhongse Kasemsri, *supra* note 3.

¹⁷ "As far as the United States is concerned, any alternative to those bases would work considerable hardship on its ability to intervene in a critical area" (p. 241, remarks of James Gregor).

¹⁸ "[Whether the PRC] can tolerate the laissez-faire administration that has fostered Hong Kong's dynamism will be a severe test. The decline in the value of the Hong Kong dollar in 1983 suggests some lack of confidence among Hong Kong investors that the PRC can pass the test" (pp. 303-04, remarks of Ralph H. Clough).

La Questione delle Falkland-Malvinas nel diritto internazionale. Edited by Natalino Ronzitti. Milan: Dott. A. Giuffrè Editore, 1984. Pp. xvii, 464. Indexes. L. 32,000.

This book is a collection of studies by 12 contributors relating to the multifaceted legal aspects of the armed conflict between Argentina and the United Kingdom over the Falkland Islands, including the Falkland Island Dependencies; preceded by an introduction from the pen of Professor Ronzitti, the organizer and general editor of the enterprise. The work is the result of a collaborative effort of the research centers of the Universities of Milan, Naples, Pisa, Siena and Trieste. The majority of the authors apparently are younger scholars, still outside the academic hierarchy. This factor, however, has not militated against the quality of the product.

Each of the 12 contributors deals with a particular aspect of the conflict, although some of them form recognizable subgroups. Thus, the first two essays discuss the history of the conflict and the legal bases of the claims of the contestants. The next three deal with the status of the Falkland Islands and the other British dependencies in the South Atlantic under the aspects of the Antarctic Treaty of 1959 and the right to self-determination or decolonization as enshrined in the Charter of the United Nations and the supplementary resolutions of the General Assembly. These five, by nature introductory, essays are succeeded by two discussions concentrating on the legality of the use of force by Argentina and counteruse of force by the United Kingdom, written by Andrea Gioia (Pisa), and on the legal aspects of the naval operations conducted by the United Kingdom, authored by Gabriella Venturini (Milan). Undoubtedly, these two pieces constitute the heart of the collection. They are followed by two discussions of the role of the Security Council and the OAS in and during the conflict. Then the focus shifts to the legality of the economic measures taken by the United Kingdom and Argentina for the enforcement of their claims and of the imposition of economic countermeasures by the EC countries and other third nations. This subject is treated by two principal essays, followed by a shorter piece, contributed by Professor Conforti, which comments on the particular difficulties created by the Treaty of Rome, establishing the EEC. As may be remembered, these obstacles were encountered by the United States when the administration sought the support of the EEC members in the conflict with Iran. The final chapter, a joint contribution by Professors Conforti and Francioni, deals with the prospects for a peaceful settlement of the controversy.

In its entirety, the volume constitutes a well-organized, comprehensive, detailed and fairly balanced treatment of the background and legal ramifications of the course of events during the period commencing with the Argentine landing on the island of South Georgia on March 18, 1982 and the occupation of the Falkland Islands on April 2, and terminating with the surrender of the Argentine forces on June 14. Of particular interest is the discussion on pages 211-27 of the measures taken by the United Kingdom in support of its naval operations such as the closure of the local airport and

the establishment first, on April 12, of an exclusion zone around the Falklands and soon thereafter, on April 28, of a total exclusion zone having the same boundaries, followed by an exit blockade for Argentine military naval ships and aircraft, prohibiting the traversing of a 12-mile limit from the coast. As the respective author notes, the acceptance of the total exclusion zone by third nations demonstrates the obsolescence of the traditional rules of maritime and aerial warfare and a further contraction of the freedom of navigation.

STEFAN A. RIESENFELD
Board of Editors

Die auswärtige Gewalt des Europa der Neun. By Christoph Wilhelm Vedder.
Göttingen: Verlag Otto Schwartz & Co., 1980. Pp. xxi, 297. Index.
DM 68.

In one sense, the title of this solidly documented doctoral dissertation on "The External Power of the Europe of the Nine" promises more than the study actually delivers. The principal "external" or "foreign affairs powers" of the European Communities encompass, *first*, the authority to take unilateral legislative or administrative measures in the field of foreign economic policy (e.g., antidumping and antisubsidy legislation), and *second*, the authority to conclude international agreements with nonmember states and international organizations. The bulk of this study is confined to the second of the two categories, the "treaty-making power," although a brief but effective introductory section deals with the general problem of the status of the European Communities in international law and their international personality.

Since the mid-1970s the European Economic Community has emerged as a significant actor on the international scene. It has established relations with almost all industrialized and Third World states by means of a bewildering variety of commercial, "association" and "economic cooperation" agreements, dealing with questions of trade, economic development, science and technology, the environment, transport, fisheries, food aid and so on. Any effort to classify these agreements in comprehensive legal categories is virtually impossible since the legal basis on which the Community institutions, alone or jointly with the member states, negotiated and concluded a treaty has varied and often has been left ambiguous. In this field, even more than in matters of internal policy, member states have been reluctant to concede the loss of their national external powers. It is therefore not surprising that the actual practice bristles with legally opaque compromises.

Focusing first on the area of foreign commercial policy, where the constituent European Economic Community Treaty has given the common institutions express treaty-making authority, the author wisely chose to classify the various commercial agreements according to their economic and political

nature rather than by legal criteria.¹ The main question in this field, only in part clarified thus far by the Court of Justice of the Communities, has been what matters, in addition to the traditional subjects of trade agreements (tariffs, quotas, etc.), fall within the category of "commercial policy" and thus within the exclusive power of the Community.²

In the well-structured second part, the author explores the treaty power outside the field of the expressly delegated authority. Against the prevailing learned opinion, and to the consternation of the member state governments, the Court of Justice rejected the principle of "enumerated powers" in favor of the liberal doctrine that the treaty power of the Community is coextensive with its internal powers (the so-called internal/external parallelism). The author examines the impact of this broad "implied powers" definition on the actual practice, showing the reluctance of the political institutions of the Community to draw on the full measure of Community power as defined by the Court. The varied patterns of Community participation in multilateral treaties and in international organizations are next dealt with, ranging from the Community's de facto replacement, for most purposes, of the member states in GATT to complex joint negotiation and participation formulas in "mixed agreements" and international boards. Some attention is given to the increasingly important "European Political Cooperation (EPC)," an extra-Community mechanism for the gradual harmonization of national foreign diplomatic policies, now scheduled to be included in an amended Community Treaty.³

The book concludes with a concise discussion of the relationship between international law and Community law and offers some sensible final observations directed at the policymakers.

ERIC STEIN
Board of Editors

Eine Verfassung für Europa: Von der Europäischen Gemeinschaft zur Europäischen Union. Edited by Jürgen Schwarze and Roland Bieber. Baden-Baden: Nomos Verlagsgesellschaft, 1984. Pp. 631. DM 98.

The year 1986 was an eventful one for the European Communities. On its first day, the treaty of June 12, 1985, among the existing 10 members

¹ For an attempt at a legal classification, see C. FLAESCH-MOUGIN, *LES ACCORDS EXTERNES DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE—ESSAI D'UNE TYPOLOGIE* (1979). For an excellent commentary on the relevant EEC Treaty provisions and practice, see 12 J. MÉGRET, J. V. LOUIS, D. VIGNES, M. WAELBROECK, J. DEWORST & P. BRÜCKNER, *LE DROIT DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE: COMMENTAIRE DU TRAITÉ ET DE TEXTES PRIS POUR SON APPLICATION* (1970-1980).

² In its Opinion No. 1/78, *International Agreement on Natural Rubber*, 1979 ECR 2871, the Court of Justice took the broad view of Community power by holding that modern commodity agreements fall within the exclusive Community authority except when the financing is supplied by the member states.

³ On the more recent development of the EPC, see Stein, *European Political Cooperation (EPC) as a Component of the European Foreign Affairs System*, 43 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 49 (1983). For the text of the proposed amendment, see *Single European Act*, BULL. EUR. COMM. Supp. No. 2/86. See generally Stein (with Henkin), *Towards a European Foreign Policy?*, in 1 *INTEGRATION THROUGH LAW*, Book 3 (M. Cappelletti, M. Seccombe & J. Weiler eds. 1986).

of the European Communities and Portugal and Spain relating to the accession of the latter two countries to the European Economic Community, the European Atomic Community and the European Coal and Steel Community¹ went into effect, doubling the original membership of these organizations, increasing their population to 321 million inhabitants and enlarging their territories to 2,259,000 square kilometers.² On February 17 and February 28 of that year,³ the representatives of the 12 member states signed the Single European Act⁴ whose ratification by the member states will constitute an important further step towards the creation of a European Union, which was declared to be the principal goal of the member governments at the summit conference of the heads of state and government of the Community countries, held in Paris on October 19 and 20, 1972.⁵ The final text of the Single European Act was approved by the European Parliament on January 16, 1986,⁶ despite the fact that the progress in integration made by that instrument fell far short of the text of a draft treaty establishing the European Union, initiated by the European Parliament and finally adopted by that body in 1984.⁷

The aforementioned parliamentary initiative for the creation of a European organization, achieving a higher degree and broader scope of integration on a more democratic basis, is the subject of this volume, edited by Professor Jürgen Schwarze and Dr. Roland Bieber under the title *Eine Verfassung für Europa*. Actually, the book is a collection of papers delivered and discussion contributions made at a conference held in Hamburg in 1983, on the parliamentary project shortly before its adoption in final form early in 1984.

The 19 participating panelists and discussion contributors were academicians, members of the European Parliament and high-ranking members or officials of the other Community institutions, including the intellectual father of the parliamentary offensive for more extensive and democratic integration, the great Italian European, Altiero Spinelli. The contributions range from fiery advocacy of the need and urgency of action to a skeptical appraisal of the political and legal obstacles to the translation from proposal into reality. Perhaps the most balanced and realistic assessment of the merits and prospects of the parliamentary démarche was expressed in the paper by Dr. Glaesner, then the Director General of Legal Services of the Council of the European Communities, entitled (in translation): "Influences of the Member States on the Evolution, in particular the Decision-Making Process, of the Community" (pp. 167-90).

Although for the moment a much more modest step forward, which nev-

¹ The treaty and the act of accession are published in 28 O.J. EUR. COMM. (No. L 302) 1 (1985).

² See BULL. EUR. COMM., No. 1, 1986, at 7.

³ See *id.*, No. 2, 1986, at 7-11.

⁴ The text is reprinted in *id.*, Supp. 2/1986.

⁵ Point 16 of the final declaration of the conference, in *id.*, No. 10, 1972, at 23.

⁶ *Id.*, No. 1, 1986, at 9; 29 O.J. EUR. COMM. (No. C 36) 113 (1986).

⁷ 27 O.J. EUR. COMM. (No. C 77) 28-54 (1984). For the text of the draft treaty, see *id.* at 33-52.

ertheless provides for a greater role for the European Parliament in the lawmaking process, is on the horizon,⁸ the assorted papers provide important insights into the aspirations for, and political and legal obstacles to, the Unit- ing of Europe.

STEFAN A. RIESENFELD
Board of Editors

Republika Federalna Niemiec w dobie rządów koalicji socjaldemokratyczno-liberalnej (1969–1982) (The German Federal Republic under the Government of the Socialist-Liberal Coalition). Edited by Antoni Czubiński and Lech Janicki. Poznań: Instytut Zachodni, 1985. Pp. 638. Zł. 350.

The Western Research Institute (Instytut Zachodni) was established to study the West as a political and economic entity. For the institute, Germany is a subject of singular attention. The list of publications included in the volume notes 41 positions on the German theme.

The present work follows an earlier study on West Germany, which appeared in 1965. This is a broader effort, however, with an introduction covering the earlier developments.

The work under review consists of 25 essays organized into six parts centering on German foreign policy in the broadest sense—political, defense, economic and cultural. Its *pièce de résistance* is the so-called *Ostpolitik*, the result of the transition of German socialists from political limbo to an active and leading role in West Germany.

After World War II, the German Social Democratic Party (SPD) was opposed to all changes that the war had produced for Germany: division, territorial cessions in the East, the integration of West Germany into the free world both economically and militarily (NATO), and the acceptance of American leadership. The SPD's intransigent position could be maintained only while the party stayed out of government. In 1966, it formed a coalition and a government with the Christian Democrats, with Willy Brandt as its foreign minister. The main objective of its foreign policy was the reunification of Germany, and working relations with the Soviet bloc. In 1969, the SPD allied itself with the Free Democrats, who represented a liberal trend in Germany, and formed a government that stayed in power until 1982.

Ostpolitik is described against the background of general German foreign policy, shaped by economic and social conditions, the loss of the agricultural East and the need to export more than before to other industrialized countries. It is tied to an alliance with the Western powers, which alone could guarantee the survival of West Germany.

Each part of the book adds to the story of German foreign policy. Part II, "Internal Relations," also deals with international economic cooperation, rearmament and NATO cultural cooperation with emphasis on the international position of Germany. It leads to part III on foreign policy in the free world and in Third World countries. Part IV is devoted to *Ostpolitik*. Part V covers the activities of the opposition (political, social and cultural)

⁸ But see the more pessimistic assessment of the Single European Act by H.-J. Glaesner, *Die Einheitliche Europäische Akte*, 21 *EUROPARECHT* 125 (1986).

and trends in public opinion; West German radical movements such as the Greens are greatly reminiscent of radical movements in other countries, including the United States. The volume ends with an account of the downfall of the coalition.

This is an important contribution to our understanding of the last two decades of West Germany's foreign relations and the policies that have established working relations with the socialist bloc. The team of authors includes historians, sociologists, economists, foreign trade experts and political scientists. The general tone is that of objective and sympathetic detachment. It is clear why. The Soviet bloc has won the main points of its policy toward West Germany—separate statehood for East Germany and the reestablishment of diplomatic relations. New treaty arrangements between the two Germanys regarding juristic and economic cooperation have benefited the East. The Soviet Union opened the door to economic penetration of Western markets. Furthermore, as a result of *Ostpolitik*, Franco-German relations were redefined.

The author of these lines can only regret that this work by Polish scholars is not accessible to the reading public in the free world.

K. GRZYBOWSKI
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Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht. By Rudolf Dolzer. Berlin, Heidelberg, New York, Tokyo: Springer Verlag, 1985. Pp. xiii, 331. Index. DM 118.

Dr. Dolzer recognizes the central problem raised by the subject he has had the courage to devote a treatise to: "the attempt of the developing countries to remove the law of expropriation from the area of law concerning the rights of foreigners and to reformulate and reshape the law of expropriation as a separate problem of international and economic law" (p. 5). He also recognizes the preordained failure of his labors at the outset: because of those attempts of the developing nations, "simple and absolutely clear answers to the fundamental questions of the law of expropriation cannot be expected today" (*id.*).

Nevertheless, Dolzer pursues his Holy Grail. He recalls the Garden of Eden in flower at the turn of the century when the Eighth Commandment, "Thou shalt not steal," was not only taken for granted, but held binding upon governments. He quotes Article 46 of the fourth Hague Convention of 1907 on the rules of war: "Private property cannot be confiscated." He quotes Elihu Root as to "a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world." And halfway through his treatise he even quotes Jeremy Bentham: "Property and law are born together."

The first of the two principal parts of Dolzer's treatise is entitled "Foundations of the Protection of Property in Contemporary International Law." It traces the fall from grace. Dolzer finds the first trembling of the foun-

dations in the UN General Assembly's Resolution 1803 of 1962, which provided that in cases of expropriation of natural resources, "the owner shall be paid appropriate compensation . . . in accordance with international law." Although that resolution was, according to Dolzer, "the first time the community of nations endorsed unanimously a definitive form of protection of foreign property under international law" (p. 22), the use of the term "appropriate" served to make the resolution consistent not only with the Hull formula of "prompt, adequate and effective compensation," but also with the position that the Hull doctrine "could no longer be considered in all its particular aspects as an expression of the *lex lata*." What those "particular aspects" might consist of had lain pregnant in the womb of the United Nations ever since it produced the formula "permanent sovereignty over natural resources" in 1952, a formula that could be used to justify all kinds of robbery and tearing up of contracts.

When Algeria, Iran and Syria succeeded in having the General Assembly delete *any* reference to international law in Resolution 3171 of 1973, the death knell of the international law for the protection of foreign property seemed to have rung, at least in the United Nations. Nevertheless, Dolzer traces indications that the law accepted "by all civilized countries" may have life in it yet.

Indeed, the best and certainly the most readable part of Dolzer's treatise is his marshaling of developments suggesting, though not demonstrating, that economic realities may be forcing the "socialist" and "developing" nations to abandon their rhetorical justifications of expropriation without compensation. He finds those developments in two areas: bilateral investment treaties and debt settlements, and the international law of human rights.

In the first area, relying on Richard Lillich and Burns Weston, he notes that bilateral governmental settlements of claims for expropriation have provided compensation in amounts varying between 80 percent and 20 percent of fair market value. Many of these settlements were concluded with Communist governments, "which have always denied the existence of any international law of expropriation." While many of these bilateral settlements were thus not exactly what Secretary Hull would have wished, neither did they correspond to the more trendy teachings of the governments of less-developed and Communist countries.

Similarly, a number of less-developed countries that have voted for resolutions regarding the untouchability of national sovereignty as a justification for expropriation without compensation have adopted domestic legislation and entered into treaties with exporting countries that incorporate the principles of the Hull formula for compensation. There have been close to two hundred such treaties.

The inconsistency of the positions taken by those governments in multilateral forums on the one hand, and in bilateral treaties on the other, however, is more apparent than real. Both positions are based on greed: once old investments have been taken over without paying, the necessity of attracting new ones becomes more overriding. If that new money can be lured away only by abandoning the old rhetoric that served so well at the United

Nations and at meetings of the so-called nonaligned countries, so be it. As Goethe's Mephistopheles said about sex:

One must not talk before chaste ears about
That which chaste hearts can hardly live without.

Dolzer mixes hope and authority when trying to evaluate the significance of those developments for the formulation of a generally accepted rule of international law. They lead him to hope, but like other scholars and courts, he recognizes the "opportunistic factors" and the particular motivations and political pressures that create particular treaties. Hence, he must conclude, again and again, that "definitive statements on present and future valid customary law are hardly possible" (p. 287).

The second area in which Dolzer discovers hopeful signs of a general recognition of the sanctity of property is that of human rights. True, the United Nations foundered when attempting to include the right to own property in its Declaration of Human Rights. But the American, European and African Conventions on Human Rights include the right to property. Dolzer states rather cynically that "the explanation of the discrepancy" between the opposition to the protection of property as an element of international law and the inclusion of a guaranty of property in the African and American regional pacts may lie in "the limited possibilities of enforcement" for the regional pacts. But since enforceability is neither exactly the hallmark nor the test of international law recognized as such by the United Nations, Dolzer's explanation is not persuasive. It is noteworthy that the regional conventions make no distinction between "personal property," in this context meaning the kind one is admonished not to leave behind in airplanes (the kind that even Communist regimes recognize in theory), and other property covering such items as "the means of production."

While Dolzer rightly questions the effectiveness of recognizing a right to property without articulating any right of compensation for deprivation of property, he draws one hopeful conclusion from the return of an appreciation of property to quarters where the idea seemed to have been chased away forever: once established as an individual human right, the right to property of individuals should no longer be subject to being bargained away or waived by governments in bilateral intergovernmental negotiations; nor may courts prevent the restitution of property, stolen by governments of another country, to its rightful owners in reliance on the act of state doctrine. In discussing these implications of the international recognition of human rights for international law, Dolzer has his most creative moments.

There are few such moments in the second principal part of the treatise, dealing with the concepts of property, expropriation and compensation. At least for an American reader, the discussion of those concepts is on such a level of abstraction that any practical relevance to the here and now is indiscernible. Within a short space it is impossible to substantiate this generalization. A few illustrations must suffice: in four pages of discussion about the distinction between a legally permissible and a nonpermissible taking of private property in the Federal Republic of Germany, not a single fact is

mentioned. There are 15 pages of inquiry into the definition, or lack of definition, of property in various kinds of treaties, in connection with the question whether there is such a thing as a separate concept of property in international law as distinct from national law.

No wonder Dolzer only finds "a dilemma: neither does customary international law define the concept, nor can it be defined in the meaning of a defined national structure of law" (p. 167). Thus, the only way around this self-made dilemma that "might" be used is to rely on "general principles of law recognized by civilized nations that under Art. 38, sec. 1(c) of the Statute of the International Court may also be sources of international law" (*id.*).

To give a final illustration of the book's indigestible level of abstraction: there are four pages elaborating the obvious proposition that "the taking of property is not limited to the formal taking away of legal title."

The treatise ends as it began: by reiterating that there is no generally accepted international law on its subject matter. The main weakness of the treatise, as of much expenditure of learning by our brethren in other areas of international law, is thus its failure to address whether or not there can be any law without a shared universe of basic values. Would any state of the United States have a criminal code if representatives of the Mafia could have vetoed its enactment?

FRANZ M. OPPENHEIMER
Of the District of Columbia Bar

Mezhdunarodnoe sotrudnichestvo v borbe s ugolovnoy prestupnostju (International Cooperation in the Fight against Penal Offenses). By S. V. Borodin and E. G. Lyakhov. Moscow: "Mezhdunarodnye Otnoshenija," 1983. Pp. 200. 80 kopecks.

This book, as its subtitle elaborates, deals with the problems of UN activities in the field of crime prevention and the treatment of offenders.

In the introduction one reads, among other things, the pathetic dogma that crime is a transitory phenomenon, and "will cease to exist after the disappearance of the exploiting [historical] formations and classes." Chapter 1 covers the history of the pertinent international cooperation, touching on extradition and asylum, and giving a very superficial and partially biased picture of developments up to 1945. What is especially striking is the approach to the activities of the League of Nations and of the International Association of Penal Law. The first is criticized for its weaknesses; these, apart from "structural failures," are explained by the fact that its founders, allegedly, did not want "to really occupy themselves with problems of international cooperation" (p. 18).

There is a brief reference to resolutions adopted during that period by the international conferences for the unification of penal law "of the capitalist countries" in the fight against "so-called terrorism" (p. 20). The main aim of these resolutions, it is maintained, "was the creation of a 'legal' basis for the fight against mass-scale revolutionary actions." The murders, of, for

example, the King of Yugoslavia and the French Minister of Foreign Affairs in Marseilles, in 1934, seem to have been forgotten. One may recall, in this connection, that the USSR, at the time, condemned these assassinations as manifestations of "individual terror." And the Soviets could never forgive the Polish press correspondent in Moscow, Jan Berson, who classified this stand, given the realities of the Stalinist regime, as "an attitude of wholesalers vis-à-vis retailers," and was later expelled from the USSR. Poland retaliated with the expulsion of a Soviet correspondent.

Concerning the approach to present cooperation in the field under UN auspices, covered in subsequent chapters, the following picture emerges. On the one hand, the USSR wants to be seen and heard at the UN Congresses on the Prevention of Crime and the Treatment of Offenders and at the sessions of the Committee on Crime Prevention and Control: participation in them may also result in some useful information and contacts. On the other hand, there is evident fear of "imperialist" penetration and interference in a realm where the Soviets are very vulnerable, and so sovereignty is obsessively referred to (e.g., pp. 117, 174, 183). In this connection, one notes that on pages 174-75 the authors mention the principle of noninterference in the internal affairs of states and the observance of their sovereign rights, and immediately after that refer to their (i.e., the states') right freely to determine and develop their political, social, economic and cultural systems. Indeed, one witnesses here—a Freudian slip?—the substitution of governments' rights for the pertinent peoples' rights.

The demand for the publication of criminal statistics is rejected on the grounds that publication or nonpublication "is the right of each sovereign government" (p. 58). What is more, attempts to publish "global" international criminal statistics are, allegedly, "useless" for real international cooperation and may also divert the means and energies of the United Nations from the realization of its main task—peace and security (p. 59). The ideal solution, evidently, would be to consider the respective UN forums as mere discussion bodies.

According to the authors, implementation of the "humanitarian rules" contained in UN documents is (concerning the countries of their own group) totally up to the individual governments. A clearly different position is represented regarding other countries:

[These rules] . . . are a serious factor, which gives to the populations subjected to repression in such countries as the Republic of South Africa, Chile and a number of other ones, moral and political foundations for a fight against discriminatory, reactionary and repressive policies and practice of criminal justice, for the acceptance of respect for the human person, and for the security of rights which human beings ought to enjoy [p. 178].

Though an attempt is made somehow to "divorce" the UN work in the standard-setting field of criminal justice from the international "general" protection of human rights (pp. 184-86), evident links are not denied. This is clear from paragraph I of chapter 4 (pp. 146-74), where, among other things, the pertinent provisions of the Universal Declaration of Human

Rights and of the International Covenant on Civil and Political Rights are reviewed.

International control is frowned at. This applies to procedure 12 of the Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners, adopted at the fourth session of the Committee on Crime Prevention and Control in 1976; it provides for the possibility of lodging communications (complaints) with the UN Secretary-General, and their consideration according to ECOSOC resolution 1503 (XLVIII) of 1970, Procedure for Dealing with Communications relating to Violations of Human Rights and Fundamental Freedoms.

There is also criticism of the idea of the creation of the position of a UN High Commissioner for Human Rights (pp. 139, 183). Especially incompetent is the "appraisal" of the West European system of regional protection of human rights:

The history of international relations has shown the hopelessness of the formation of a kind of mechanism that would deal with problems that, by their very nature, belong to the internal competence of states. A clear example of this is the creation and activities of the European Court of Human Rights and the European Commission of Human Rights, which have proved the fruitlessness of the existence of international organs created with the aim of dealing with complaints by individuals [p. 142].

In sum, a rather biased and deficient book. It may be useful only insofar as it gives some factual information to the Soviet reader interested in international human rights in the field of criminal justice.

RICHARD SZAWLOWSKI
Vancouver, B.C.

Foreign Relations of the United States, 1955-1957. Vol. I: Vietnam. Edited by Edward C. Keefer and David W. Mabon. Washington: U.S. Govt. Printing Office, 1985. Pp. xxvi, 912. Index.

Foreign Relations of the United States, 1958-1960. Vol. I: Vietnam. Edited by Edward C. Keefer and David W. Mabon. Washington: U.S. Govt. Printing Office, 1986. Pp. xxvi, 774. Index.

These volumes provide the official diplomatic documentation of U.S. relations with Vietnam and its internal problems and developments during the last 6 years of the Eisenhower administration. Seeking to reestablish its control over Indochina after World War II, France battled both Communist (Vietminh) and nationalist forces from 1946 to 1954, and was defeated at Dien Bien Phu in May 1954. As a result of the determinations of the Geneva Conference on Far Eastern Affairs (1954),¹ the French Government signed

¹ For documentation on the conduct and results of this conference, see FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, VOLUME XVI: THE GENEVA CONFERENCE (1981), reviewed at 76 AJIL 467 (1982).

treaties with the pro-French Vietnam Governments in June, dividing the country along the 17th parallel—which gave the Communists under Ho Chi Minh control of 22 provinces in the north (which became the Democratic Republic of Vietnam), and 39 provinces to South Vietnam. Ngo Dinh Diem, interim leader, proclaimed the latter the Republic of Vietnam in October 1955 and, following a referendum, became its first President. Fighting with the Vietcong (Communist-led forces in South Vietnam) persisted during this period.²

To summarize: much of the material contained in these anthologies of diplomatic records concerns the problems of postindependence political and military stabilization within South Vietnam and between the two Vietnams; the political power struggle in South Vietnam and the establishment of a legitimate government by democratic process; the economic, political and military interests of the United States in Vietnam and the latter's relations with Cambodia, Laos and Thailand; the withdrawal of French military forces from Indochina and the early stages of U.S. military involvement; and reaction to the Communist insurgency in the Republic of Vietnam.

These compilations constitute the first of 27 volumes in the *Foreign Relations* series contemplated by the Department of State for the years 1955–1957, and the first of 17 volumes for 1958–1960. They present 685 documents, numbered sequentially—411 for 1955–1957, and 274 for 1958–1960—and are arranged chronologically. Quantities of these embrace the usual telegrams and memorandums (including summaries of conversations, transcriptions of telephone exchanges and memorandums “for the record”), as well as occasional letters, reports and other papers and communications that flowed among U.S. Government agencies in Washington and between the Department of State and its missions in Vietnam and other countries.

Those interested in high-level U.S. policy formulation and coordination will welcome ready access to the texts of pertinent National Security Council (NSC) records—eight “memorandums” of its discussions and decisions, several “N.S.C. documents” and six “N.S.C. actions.” These are accompanied by the texts of six National Intelligence Estimates (concerned with such matters as rationalized “prospects” for North and South Vietnam, probable development “projections,” “short-term trends” in South Vietnam and the “Saigon Crisis” of 1955) and selected papers of the NSC Planning Board (concerned with policy formulation) and the Operations Coordinating Board (responsible for monitoring policy implementation), which served as the principal NSC subagencies during the Eisenhower administration. Other government offices contributing to these materials are the Central Intelligence Agency, the Department of Defense, the Joint Chiefs of Staff and, to a lesser extent, the International Cooperation Administration.

Aside from Secretary of State John Foster Dulles, major contributors to these documents include the Assistant Secretary for Far Eastern Affairs

² For pertinent background documentation on Vietnam, see FOREIGN RELATIONS OF THE UNITED STATES, 1952–1954, VOLUME XII: EAST ASIA AND THE PACIFIC, Part 1 (1984), and VOLUME XIII: INDOCHINA (1982), reviewed at 78 AJIL 557 (1984).

(Walter S. Robertson, 1953–1959), the President's Special Representative to Vietnam (General J. Lawton Collins, November 1954–May 1955), the American Ambassadors to Vietnam (G. Frederick Reinhart, 1955–1957, and Elbridge Durbrow, 1957–1961), and the leaders of the American Military Assistance Advisory Group (MAAG) and the Temporary Equipment Recovery Mission (TERM). The MAAG was essentially a small American military training mission, and the TERM was responsible for managing the preservation of Mutual Assistance Program military equipment and the logistical training of South Vietnamese military forces. For those interested in top-level diplomacy, these volumes provide some discussion on, and the texts of, President Eisenhower's summit letters to Bao Dai (South Vietnam's chief of state until October 1955) and President Diem, and commentary on Secretary Dulles's trip to Indochina in March 1955, Vice President Nixon's 2-day visit to Saigon in July 1956 and Diem's summit visit to the United States in May 1957. Although President Eisenhower undertook a major summit trip to the Far East and visited the Philippines, Taiwan and Korea in 1960, Vietnam was not included in his agenda.

So far as the principal topics treated in these compilations are concerned, the 1955–1957 volume is divided into three major sections. The first—January–May 1955 (409 pages)—deals with the consolidation of the Government of President Diem in South Vietnam, consideration of his replacement and the U.S. decision (with the endorsement of the French and British Governments) to support him; Secretary Dulles's Indochina visit; the issue of U.S. and French military training responsibilities in South Vietnam; and the "Saigon crisis," produced by the dissidence and rebellion of a number of "sects" (the Binh Xuyen, Cao Dai and Hoa Hoa) that were anti-Communist armed politico-military groups seeking to block reforms and harass the government and vying for political power and control.

The second, relatively short portion—May–November 1955 (175 pages)—focuses on the question of holding elections in Vietnam, including consideration of U.S. policy on "all-Vietnam elections" and an Australian proposal to convene a four-power (Australia, France, the United Kingdom and the United States) conference in Saigon to consider the issue; attempts to engender electoral consultations between North and South Vietnam; U.S. policy respecting the possible renewal of hostilities there; and the Diem-Bao Dai referendum. This referendum was held on October 23, 1955, to settle the question of contested leadership in South Vietnam; there was a heavy turnout and Diem received more than 98 percent of the vote.

The final segment—November 1955–December 1957 (310 pages)—emphasizes U.S. long-range planning for Vietnam; elections for South Vietnam's National Constituent Assembly (held on March 4, 1956); issues of land reform and foreign investment in South Vietnam; the maintenance of internal security, the functioning and staffing of the U.S. MAAG mission (which was authorized under an agreement signed in December 1950), and the activities of the TERM mission; NSC consideration of contingency planning for dealing with local aggression in Vietnam; U.S. economic, military and technical assistance; and President Diem's 3-day state visit to Washington in 1957.

In contrast, the 1958–1960 volume (752 pages of documents) is not divided into separate sections. It continues documentation on the American TERM mission and on adjusting the personnel ceiling for the MAAG mission. Other papers emphasize the development of the Vietnam Civil Guard and the status and activities of paramilitary forces in Vietnam; the upgrading of the Republic of Vietnam's armed forces; the deterioration of internal security; insurgency activities and debate over counterinsurgency measures; the Can Lao Party (National Revolutionary Movement); corruption and the use of U.S. aid; and the growth of political opposition to Diem and the abortive Vietcong coup to overthrow him in November 1960.

Interlaced in these compendiums are materials on such additional matters as the following: the nature of continued French military involvement in Vietnam and the eventual withdrawal of French forces (embracing not only the Expeditionary Corps but also air and naval training missions); the operations of the International Control Commission, composed of Canadian, Indian and Polish representatives, which was responsible for the enforcement of the Geneva Accords and for responding to armistice violations (it also coped with controlling the importation of arms from Communist China, the lack of Vietnamese cooperation and the holding of national elections); and the questions of reconvening the Geneva Conference and Soviet pressure to have a meeting of the Geneva Conference cochairmen (representing the Soviet Union and the United Kingdom) or to summon an alternative conference of interested governments. Other topics touched on in these documents include Communist China's intervention in Vietnamese affairs; broadening democratic support for Diem; the status of the National Police Force, the Self-Defense Force (composed of village defense units) and the National Army and Air Force in South Vietnam; the reunification policy of North Vietnam; proposals for political reform in the Republic of Vietnam; refinement of U.S. foreign assistance policy; the resettlement and treatment of refugees; and the impact of the Manila Pact (Southeast Asia Collective Defense Treaty of September 1954) and the role of the Southeast Asia Treaty Organization (SEATO).

These comprehensive, carefully edited, well-structured and useful volumes were compiled by John P. Glennon (editor in chief), Edward C. Keefer and David W. Mabon (editors), of the Office of the Historian, Department of State. They supplement the documents with extensive footnotes providing specific sources, the general archival resources employed, cross-references and other data, as well as occasional descriptive and explanatory "editorial notes" that interrelate facts and documents. In each volume the compilers also supply the user with a list of both unpublished public and private source collections (with their location and identification designations) and public and private published sources (including a substantial number of selected secondary accounts); a handy list of abbreviations, acronyms and symbols to facilitate understanding much of the truncated language of the documents; and an encompassing list of persons referred to, giving their names, titles and length of tenure. The detailed indexes appended to these compilations are exhaustive and well organized. In short, again evidencing the traditional

high standards of selection, organization and treatment characteristic of the Department of State's *Foreign Relations* series over the years, these volumes constitute substantial and indispensable resources for all who are concerned with the development and implementation of U.S. policy respecting the problems and foreign relations of Vietnam during this critical period preceding American involvement in the Vietnam War.

ELMER PLISCHKE

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Peace and Disputed Sovereignty: Reflections on Conflict Over Territory. By Friedrich Kratochwil, Paul Rohrich and Harpreet Mahajan. Lanham, New York, London: University Press of America; New York: Institute of War and Peace Studies, Columbia University, 1985. Pp. xi, 159. Index. \$23.75, cloth; \$10.75, paper.

This study examines what it takes to be the special features of international conflicts over territory. On the basis of historical and functional analyses of meanings attributed to territory and uses to which it is put, together with eight cases, the authors derive certain insights that they believe might prove useful to third parties interested in facilitating settlement (pp. 122-23). They also seek to generate a number of strategic suggestions aimed at increasing the congruence of disputants' perspectives, broadening their consciousness of options and developing a range of interim solutions. In particular, the authors propose pluralization of intervention, disaggregation of territorial rights and/or uses and increases in conciliatory rather than disjunctive legal solutions. There is a useful appendix, based on questionnaire responses solicited from UN members, supplemented and verified by more conventional sources, of contemporary boundary disputes *in passe* and *in esse*. A table of "success stories"—boundary or territorial disputes that were peacefully settled—would have been instructive as well as encouraging.

One notes a puzzling lack of integration in the different parts of the book. Little of the very interesting functional and historical analysis in the first part is brought to bear in the subsequent sections. Thus, the review of the serial war over the Ogaden does not treat the indispensability of the area for pastoral Somalis in their ecological environment. Nor does it sufficiently treat fissiparous pressures on Ethiopia and, hence, the great difficulty its Government would have had in being accommodating in disputes over any one of its peripheral territories, no matter how unimportant it was, for fear of the effect it might have on other contested areas.

Such oversights may be related to a more serious theoretical problem. The model of inquiry developed pays scant attention to the internal politics of the states concerned, treating states as "units" in the fashion of much contemporary study of international relations. Surely it is impossible to understand why boundary disputes erupt at a particular time or what the propitious moment is for their settlement without including careful reference

to internal political alignments and class, ethnic, racial and other political divisions. The *timing* of the eruption of the Falklands War cannot be explained without reference to internal Argentine politics; in parallel fashion, British responses in territorial cases as diverse as the Falklands, Hong Kong and Gibraltar must take account of domestic political and economic factors.

The case studies are extremely spare and the role of international law in them and the emotive force its symbols can summon sparser still. Nor is sufficient attention given to the more prosaic legal practice with regard to settling, whether finally or provisionally, boundary and territorial disputes. That accumulated practice would reveal much more creativity than is often suspected: buffer zones, stacked demilitarized zones, "neutral zones," condominiums, functional easements, rights in the territory of another with regard to commerce and transit, and so on, not to speak of the myriad institutions and arrangements for territory that a comparative survey of municipal laws would produce.

On the other hand, some of the international examples that are treated strike this reviewer as less than apposite. In particular, the examples drawn from continental shelf disputes should be used with caution in a general discussion of territorial disputes, for unique conditioning factors obtain with regard to them. One, in particular, is worthy of note. The current exploitation of continental shelves requires a stable boundary situation, without which foreign private capital investment, often involved in key phases of exploration and production, is most unlikely. When title is clouded, foreign offices are prone to discourage even the more adventurous of their national entrepreneurs, lest they themselves get drawn into the vortex when the foreseeable need for diplomatic protection arises. Hence, there are public and private, internal and external pressures for quick and peaceful settlement by dividing the baby.

W. MICHAEL REISMAN
Board of Editors

The Iran-United States Claims Tribunal, 1981-1983. Edited by Richard B. Lillich. Charlottesville: University Press of Virginia, 1985. Pp. viii, 175. Index. \$25.

American Hostages in Iran: The Conduct of a Crisis. By Warren Christopher, Harold H. Saunders, Gary Sick, Robert Carswell, Richard J. Davis, John E. Hoffman, Jr., and Roberts B. Owen, with commentaries by Oscar Schachter and Abraham A. Ribicoff. Published under the auspices of the Council on Foreign Relations. New Haven and London: Yale University Press, 1985. Pp. xiv, 443. Index. \$25.

The Iran hostage crisis will long remain a paradigm for the study of international law and foreign relations. From the seizure of the American Embassy and staff in November 1979 to the release of the hostages on Inauguration Day 1981, virtually all of the tools of diplomacy were either

employed or contemplated at one time or another. Two recent books suggest the range of material to be covered.

In publishing *The Iran-United States Claims Tribunal, 1981-1983*, the University of Virginia School of Law continues its leadership in using the symposium format to produce quickly books on important international law topics. This is, in fact, the second book from Virginia on the hostage crisis. The first, based on a symposium held in the fall of 1980 in the heat of the negotiations, was released in the spring of 1981, not long after the settlement. It was titled *The Iran Crisis and International Law*¹ and was concerned with the pending domestic litigation against Iran, the case against Iran in the International Court of Justice and the Iranian legal perspective. It included, for the first time in book form, the Hostage Agreement with Iran² and the opinion of the Attorney General approving it.

The present book on the Claims Tribunal picks up where the first one left off, although only the part on domestic litigation has a direct antecedent in the earlier work. It deals mainly with the intricate process of claims settlement that began under the Hostage Agreement and is still continuing. Although this book is also based on a symposium, its papers do not have the immediacy of *The Iran Crisis and International Law*. Almost a third of the book is taken up by a formal and densely written report, which has previously been published,³ by two Department of State employees intimately connected with the settlement process. The report describes both administrative and legal developments at the Tribunal in its first 2 years. It disclaims any intention to "engage in critical comment" (p. 2). We are, however, told that "some of the Tribunal's opinions have been neither as reasoned nor as jurisprudential as might have been expected" (p. 17) and sometimes told why. The report, for example, points to inconsistencies in opinions.

No doubt this piece will have lasting value as a first reference for citations or for facts and statistics about the Tribunal's early days. It also, by inference, provides an account of the enormous workload facing the State Department Legal Adviser's Office as agent before the Tribunal although it does not directly discuss how the United States organized itself to confront this problem.

An essay by David Lloyd Jones carefully deals with the special nature of the Agreement that created the Tribunal and the role that the Tribunal plays for resolution of claims arising under both international and private law. Essentially, the Agreement is a "one-way street." Thus, nationals of one country can make claims against the government of the other, but not the other way around.

¹ Walker, Book Review, 76 AJIL 460 (1982).

² Although there were multiple documents, they will be referred to collectively as the "Agreement."

³ 24 VA. J. INT'L L. 1 (1983). About 60% of the book has previously appeared in journals. References to recent developments and to more recent literature by contributors to this book can be found in a review by Professor Damrosch appearing at 24 COLUM. J. TRANSNAT'L L. 429 (1986).

Jones is artful in showing how the Agreement differs from prior arbitrations. The drafters of the Agreement were, however, more interested in reaching a political settlement than they were in the nature of the hybrid they were creating.⁴ Thus, efforts to parse the Agreement as if it were a carefully drawn legislative act (e.g., p. 61) are interesting but seem beside the point. Other issues that he discusses, such as enforcement of Tribunal decisions in the domestic court of "any nation," may never become significant in view of the size of the fund provided by Iran to secure judgments and the rapid accumulation of interest, which has exceeded awards thus far paid out.⁵

Both Professors Lowenfeld and Sohn have chosen to focus principally on the technical nature of the forum clause in the Agreement and the Tribunal's interpretations of it. This clause excludes from the Tribunal's jurisdiction cases that, by binding contract, were to be submitted to the sole jurisdiction of Iranian courts. Professor Carbonneau discusses general principles regarding force majeure and mitigation of damages.

In a concluding piece, Michael Hertz ably provides an overview of the litigation involving Iran in domestic courts before, during and after the hostage crisis. Strictly speaking, this chapter does not fall within the purview of the book's title. However, if the Government had not won the Supreme Court case⁶ upholding the Agreement, there would have been no Tribunal. That victory enabled the Government to end U.S. domestic litigation against Iran, shift it to the Tribunal and provide frozen Iranian assets for the security account to pay Tribunal judgments.

American Hostages in Iran: The Conduct of a Crisis is a collection of insider accounts of how government officials at the working level responded to the hostage crisis. This is not a book primarily for a legal audience. Indeed, when the first-person narratives touch on legal issues, the references seem glancing and incomplete. For example, there are several references to the fact that international law might well have prevented the United States from creating a "reverse hostage" situation where Iranian diplomats would be taken into custody (pp. 11, 300), but there is no actual discussion of the point or recognition that had the United States removed immunity from Iranian diplomats, our own Constitution would have prevented the Government from locking them up without charges. Because he was assigned a role in telling the last part of the story, even the narrative of former State Department Legal Adviser Roberts Owen makes only passing reference (p. 301) to the important role that he played in bringing the hostage crisis before the International Court of Justice. None of the writers address the difficulties occasioned by the transition of the Reagan administration into office on the day that the Agreement was concluded.

This should not in any way detract from the fact that the accounts are well written, absorbing and provide a sense of how it felt to be in Government

⁴ Some of these realities are recognized in a later essay by Professor Lowenfeld.

⁵ Henderson, *Iran Compensates U.S. Firms*, Wash. Post, Oct. 10, 1985, at A8, col. 5.

⁶ *Dames & Moore v. Regan*, 453 U.S. 932 (1981).

at that time.⁷ Understandably, none of the insiders can really distance themselves from events. For this purpose, two comments by "outsiders" are appended, one by Professor Oscar Schachter, which deals expressly with international law, and one by former Senator Ribicoff, on lessons and conclusions.

Senator Ribicoff addresses some important questions (pp. 382-83). For example, even though both the War Powers Resolution and the International Emergency Economic Powers Act require consultation with Congress when "possible," there is no clear understanding of how this should be done.⁸ Ribicoff notes that although President Carter met with Senator Byrd on the eve of the hostage rescue mission to develop a list for congressional notification, Byrd was not informed that the mission was to commence almost immediately. Ribicoff does not, however, comment on the explanation given at the time by executive branch officials. Acting Secretary Christopher testified and White House Counsel Cutler opined that, because of secrecy requirements, consultation was simply not "possible." They indicated that had the operation proceeded beyond the first day (when forces were hidden in the desert), the President had planned on consultation before the next phase of the rescue when hostilities were likely to begin.⁹ Ribicoff also notes that the failed rescue attempt was the subject of an intensive study by the military but that there has been no comparable civilian review (p. 389).

Of primary interest to international lawyers is a useful chapter by Schachter, which thoughtfully and systematically explores issues raised by the crisis, including some that might have been but were not.¹⁰ He reminds us that both sides claimed international law violations by the other (p. 325) and explores difficult and subtle questions such as whether the Embassy takeover was an "armed attack" on the United States, an assertion he finds plausible. His analysis might have taken into consideration the opinion of the International Court of Justice in the *Hostages* case, which repeatedly referred to the takeover as both "armed" and an "attack."¹¹

Schachter's discussion (p. 369) of the validity of the Agreement suffers

⁷ One contributor, Gary Sick, has since turned his recollections into a valuable book-length account. G. SICK, *ALL FALL DOWN: AMERICA'S TRAGIC ENCOUNTER WITH IRAN* (1985). Half the book reviews U.S. relations with Iran prior to the seizure of the hostages. In the remainder, Sick has documented the Government's reaction to the seizure, providing what will be the definitive account of who attended which meeting and drafted which cable. He draws on his own extensive background as National Security Council "notetaker" at high-level meetings and has also checked all the other pertinent memoirs and records. Sick is able to sustain an interesting narrative that describes the tension and the infighting. He expressly disclaims analyzing the legal issues, noting that when such questions arose, "those of us without specialized training frequently felt that we were listening in on a foreign language" (pp. 310, 358).

⁸ Consultation with any more than a select group of congressional leaders has never been attempted. 4A Op. Off. Legal Counsel 127 (1980).

⁹ *The Situation in Iran: Hearing Before the Senate Committee on Foreign Relations*, 96th Cong., 2d Sess. 4, 48 (1980).

¹⁰ Unfortunately, the format of the book did not appear to have permitted the kind of documentation that Professor Schachter no doubt would have provided had his piece appeared in the pages of this *Journal*.

¹¹ 1980 ICJ REP. 3, paras. 14, 57, 64 and 91 (Judgment of May 24).

from an understandable misinterpretation of what occurred when the United States decided that it would enforce the Agreement. He states that the U.S. Government subjected itself to attack on the ground that it failed to take a position in favor of its validity (p. 370).

Some explanation is appropriate. On taking office, the Reagan administration announced that it was undertaking a review of "the so-called 'agreements' which brought our hostages back" so that their merits could be assessed.¹² Such a review was conducted. It went on for a month and carefully considered the Agreement from many points of view. The Office of Legal Counsel of the Department of Justice prepared an opinion on the international law aspects, deciding that the United States could either consider the Agreement void or could affirm it and carry it out.¹³ The opinion interpreted the decision of the ICJ as a virtual road map for voiding the Agreement under Article 52 ("Coercion of a State by the threat or use of force") of the Vienna Convention on the Law of Treaties.¹⁴ The ICJ had made frequent references to coercion by Iran in order to force the United States "to bow to its demands."¹⁵

The Justice Department opinion noted that the Agreement was not necessarily "void," however, even though that word is used in Article 52. The International Law Commission (ILC), which prepared the Convention, had said that a coerced agreement would be void so that it would not be necessary for the injured party to assume the burden of freeing itself from it. The ILC also stated, however, that it meant to "enable the State concerned to take its decision in regard to the maintenance of the treaty in a position of full legal equality with the other State." Thus, in theory, the Agreement would be viewed as a "new" treaty rather than a coerced one if "the treaty were maintained in force."¹⁶

When the decision was made to proceed with the Agreement, a statement was released saying that it was not "necessary to reach a conclusion as to the legally binding character of these agreements under international law."¹⁷ It would have been clearer to have said that under international law the United States had the option of either ratifying the Agreement or voiding it. Had the Government done so, Schachter would not have viewed the executive position as an anomaly (p. 370).

The United States went on, in fact, to do just what Article 52 contem-

¹² Statement by Secretary Haig, DEP'T ST. BULL., Feb. 1981, at G.

¹³ This opinion was not made public at the time but has recently been published as part of 264 pages of introduction and opinions relating to Iran. 4A Op. Off. Legal Counsel 69-333 (1980). The wide variety of opinions on international law and related domestic legal problems provide a continuing insight into how the Executive viewed its legal position at various times during the crisis. It serves as a useful supplement to books like *American Hostages in Iran*, which has no statement from a Justice Department participant and virtually no references whatever to the role that the Justice Department played.

¹⁴ 8 ILM 679 (1969).

¹⁵ 1980 ICJ REP. 3, paras. 74, 87 and 91.

¹⁶ Report of the International Law Commission on its 18th Session, [1966] 2 Y.B. INT'L L. COMM'N 169, 247.

¹⁷ DEP'T ST. BULL., Mar. 1981, at 17.

plated. Once the hostages were released and the source of coercion removed, the United States announced that it was in its interest to maintain the Agreement and President Reagan then explicitly ratified the orders issued by his predecessor that were necessary to carry it out.¹⁸

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Asian Pacific Regional Trade Law Seminar. (Eleventh International Trade Law Seminar, held in Canberra 22–27 November 1984.) Organized by the Attorney-General's Department. Canberra: Australian Government Publishing Service, 1985. Pp. xii, 932.

The Attorney General of Australia has, for at least 11 years, sponsored an annual seminar on international trade law. This book is a collection of the papers given at the seminar held in November 1984, which was cosponsored by the UN Commission on International Trade Law (UNCITRAL) and the Asian-African Legal Consultative Committee.

Most of the papers in this collection address *private* international transactions. Apart from a paper entitled *Multilateral Regulation of Trade and Investment in the Region*, by Justice Ryan of the Supreme Court of Queensland, relatively little attention is given to *public* regulation of trade or to GATT remedies. For the practitioner and scholar concerned with international commercial transactions, however, the book has some noteworthy contributions.

Foremost is a brilliant summary of the international conventions on carrier liability for loss of, or damage to, goods at sea. Professor Rolf Herber's paper, *United Nations Convention on the Carriage of Goods by Sea (1978 Hamburg Rules)*, begins with a discussion of the international Convention currently in force for over 70 nations, the Hague Rules. (The Convention was enacted almost verbatim in the United States as the Carriage of Goods by Sea Act.¹) After discussing the allocation of risks between carrier and shipper under the Hague Rules, Herber considers some of the antiquities in this 60-year-old treaty. These include the Convention's inapplicability when a carrier issues, through electronic data processing, a transport document other than a bill of lading. Herber also addresses the two principal amendments to the Hague Rules, namely, a 1968 protocol known as the "Visby Rules" and a 1979 protocol—neither of which has been ratified by the United States.

The balance of Herber's paper covers a new UN convention not yet in force, the so-called Hamburg Rules. It is an insightful and balanced discussion. Herber delineates the legal advantages of the Hamburg Rules over the current regime. He then gives a candid assessment of the likely impact of the Hamburg Rules on marine insurance costs. Herber concludes that the greater liability that is shifted onto the carrier under the convention is un-

¹⁸ Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

* The views expressed are not necessarily those of the Department of Justice.

¹ 46 U.S.C.A. §1301 *et seq.* (1975).

likely to result either in a decrease in worldwide marine insurance costs—as some proponents of the Hamburg Rules believe—or in an increase.

Another highlight of this book is the paper by Jesse T. H. Chang on *Trading with the People's Republic of China*. It provides a good summary of the legal regimes applicable to companies trading with and investing in the PRC, through mid-1984. While there have been enormous legal developments since then, the paper is still a fine introduction to international commercial transactions with China.

Other items of note are a paper by Professor John O. Honnold concerning the UN Convention on Contracts for the International Sale of Goods; Aron Broches's presentation on arbitration and other dispute resolution in the Asian region; and a work entitled *Extra-Territorial Issues: An Australian Perspective*, by the Deputy Secretary of Australia's Attorney General's Department, Trevor Bennett. While Bennett's piece dwells on extraterritorial assertions of jurisdiction under U.S. law, it also points to extraterritorial features of European and Australian laws.

There are shortcomings. Many of the other papers present excessive generalities, or do not adequately document the conclusions reached. Some discussants of new international conventions spend considerable time on the bureaucratic history of a particular convention, and do not give adequate attention to problems with national legal regimes—or conflict-of-laws problems—that make adoption of these conventions important. Some solid, comparative law analysis would help. On balance, the growing importance of trade with the Pacific Rim makes the publication of this annual trade law collection most worthwhile.

MICHAEL SANDLER
Of the Washington Bar

Selective Safeguard Measures in Multilateral Trade Relations: Issues of Protectionism in GATT, European Community and United States Law. By M. C. E. J. Bronckers. Deventer: Kluwer Law and Taxation Publishers; The Hague: T.M.C. Asser Instituut, 1985. Pp. xxvii, 277. Index. Dfl.165; £45.75; \$70.

As John Jackson emphasizes in his preface to his former student's comprehensive doctoral dissertation, submitted to the University of Amsterdam and published under the auspices of the T.M.C. Asser Institute, the seemingly esoteric subject of "selective safeguards" is in fact one of the key issues in current trade discussions. Must, or should, the principle of nondiscrimination implicit in the concept of most favored nation (MFN) apply to "emergency" self-help trade measures? More specifically, must, or again should, GATT Article XIX "escape" measures be applied equally to imports from all GATT signatories?

Mr. Bronckers's treatment of these questions is a well-documented if unorthodox case for selectivity. He takes the reader through his own educational process, more or less step by step, providing an excellent bibliography

and rich citations along the way. He confesses straightforwardly in the preface that four of the five chapters were published previously, two as separate articles in *Legal Issues of European Integration* during the period from 1981 to 1984. Unfortunately, only the one original chapter on "Controlling Selectivity in a New GATT Safeguards Code," completed at the end of 1984, "fully reflects [his] conclusions on the subject. . . . The reader can trace the development of [his] thinking by reading [the first] three chapters in succession, or by examining the summary of argument at the end of this book. One could also start with the third chapter. . . ." (p. 5). Given this advice by the author, as good as the third chapter may be, one could also ask the publisher whether the book is worth its price, particularly in light of the fact that the previously published material was not subsequently edited.

In rejecting the thesis that GATT's general Article I prohibition of discrimination governs the specific safeguard provision, a provision that is silent with respect to selectivity, the author acknowledges in the first two chapters the philosophical divide between fair and unfair trade measures, but then seems to ignore it. He concludes that the only real (and inadequate) support for nondiscrimination in safeguards is the Interpretative Note annexed to Article 40 of the failed Havana Charter and that a safeguards "[c]ode ought to recognize selective safeguards since they are a political reality"; the code should be accompanied by an "effective multilateral control mechanism" (pp. 77-78).

Chapter 3 categorizes the main objectives of the nondiscrimination principle as economic efficiency and deterrence of protectionist measures. It also demonstrates how Article XIX has failed to achieve them. The author attributes this problem to quantitative restrictions that disrupt the price mechanism, to product specialization and to exemption from Article XIX of preferential trade partners through customs unions or free trade agreements permissible under GATT Article XXIV. Selectivity, of course, breeds its own inequities, mainly import shifts and problems of proportionality. To counter them, Bronckers recommends provisions to permit restricted suppliers to request the extension of restrictions to those shifting their imports, or a freeze of other suppliers' import shares; a standard to constrain the amount of restrictions imposed, comparable to the base-level requirement found in the U.S. escape clause;¹ stricter time limits for safeguard measures; a mechanism that can determine fairness in individual cases; and again, multilateral surveillance of national safeguard actions.

The fourth chapter, "A Legal Analysis of Protectionist Measures affecting Japanese Imports into the European Community," and the fifth, "Private Response to Foreign Unfair Trade Practices: US and EEC Complaint Procedures," though little related to the theme of selective safeguards, are significant contributions to trade law literature. Still, the question arises whether the publisher has adequately exercised its discretion by including them in this book.

¹ 19 U.S.C. §2253(d) (1980).

As a footnote to the safeguards debate, this reviewer would offer two comments: first, that trade policymakers seem to have forgotten the Article XIX requisite that developments that prompt safeguard action be "unforeseen." Without it, emergency measures are quickly translated into merely expedient ones, selectively applied or not. Similarly, the admittedly blurred line between fair and unfair trade measures should perhaps be bolstered rather than bridged, as this author would seem to suggest.

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East-West Trade: Comecon Law, American-Soviet Trade. By Thomas W. Hoya. New York, London, Rome: Oceana Publications, Inc., 1984. Pp. xxi, 501. Index. \$60.

Thomas W. Hoya, a Hearing Commissioner in the International Trade Administration of the U.S. Department of Commerce, has drawn on a lifetime of accumulated expertise in the field of East-West trade to produce a nearly comprehensive study of how the countries of COMECON, the Council for Mutual Economic Assistance, trade with each other and how firms in market economies trade with their COMECON counterparts, the state-owned foreign trade organizations, or FTOs. A great deal has already been written on numerous aspects of this subject, but it is fair to say that no one has yet attempted the task that Hoya has set for himself in this book: to synthesize a massive amount of primary and secondary source material, much of it available only in Russian, and present it in a way that is useful both to scholars of comparative law and to practitioners in advising their American clients on particular transactions. The task plainly was a daunting one, and with two reservations discussed below it must be concluded that the author has succeeded remarkably well.

The book begins by setting the stage for a detailed discussion of the issues involved in contracting with trading partners in COMECON countries. Chapter 1 discusses intra-COMECON trade. Its primary concern is to show how this activity differs in key respects from trade between private enterprises in countries with market economies. Typically—though the balance has been shifting somewhat in recent years, at least in some countries such as Hungary—foreign trade is centrally planned and carried out on the basis of long-term agreements and annual protocols between governments, with the role of the FTOs limited essentially to implementing trade plans in individual contracts.

Chapter 2 describes the characteristic pattern of trade between the United States on the one hand, and the Soviet Union and other COMECON countries on the other: the Western trading partner typically is a private firm acting independently, while the Eastern counterpart, the FTO, is juridically separate from the government (and accordingly without recourse to sovereign immunity in contract disputes) but nevertheless state-owned and

plainly backed by the government in terms of the leverage it can employ as a monopolist or monopsonist within its particular market. It is this leverage, the author shows, that has led to some departures from the model on the Western side, whereby the U.S. Government—as in the area of grain and maritime agreements in the 1970s and 1980s—has injected itself into the process on the side of American business to achieve general political and commercial goals.

Chapters 3, 4 and 5 examine in detail the COMECON General Conditions for the Delivery of Goods, the major achievement of COMECON in putting into effect a unification of sales law with respect to trade among its member nations. The genesis of the General Conditions in the 1958, 1968, 1975 and 1979 versions is contrasted, quite favorably in many respects, with unaccomplished Western global and regional unification efforts such as those initiated by UNIDROIT, the Hague Conference on Private International Law, the International Chamber of Commerce, the UN Economic Commission for Europe and UNCITRAL. Then, the author provides a detailed comparison of the substantive provisions of the General Conditions with two of the West's unification efforts in the law of sales: UNIDROIT's Uniform Law on the International Sale of Goods (ULIS) and Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). This discussion includes several useful charts showing similarities and differences in key areas such as contract formation, the buyer's remedies for delay in delivery and for nonconformity of goods, and the time limits applied to performance and remedies.

Chapter 6 draws on this background and discusses the process of contracting between American firms and FTOs, with particular attention to the need to bargain for terms that are at least as favorable to the private enterprise as those that the FTOs are required to employ with each other under the General Conditions. The last chapter offers some speculation about likely future developments within COMECON and in the course of East-West trade. Basically, the author concludes that, at different rates for the individual COMECON countries, more authority will be given to the FTOs to determine the terms of their contracts, while in the West a gradual movement in the opposite direction will continue: governments will respond to global trade challenges by assuming a greater role in setting the terms within which private firms will operate.

Finally, the book presents valuable reference material in three appendixes: an annotated translation of the latest version of the General Conditions, together with indications of the changes from previous versions; a translation of the COMECON-Finnish General Conditions, an optional set of conditions that can serve as an aid to private firms in negotiating with COMECON FTOs; and a sample form contract for the sale of goods constructed by the author from a number of actual contracts frequently employed by FTOs.

To attempt to gear a discussion of the sort just summarized to two discrete audiences is an ambitious undertaking. Scholars probably will wish that more attention had been devoted to numerous issues in comparative law adverted to by the author in passing. Likewise, practitioners will wish that the book

contained more discussion of the practical aspects of negotiating with COMECON FTOs. Still, it must be concluded that the author has done a good job of balancing the concerns of his readers; certainly it would not have been possible to do full justice to all the relevant issues, both academic and practical, without producing a work that would have been too unwieldy for any reader—or one that would have taken so long to write that it would have been outdated before it appeared.

Nevertheless, it is necessary to point out two shortcomings. First, the book lacks a bibliography. Given the vast amount of source material employed by the author, much of it arcane, a listing arranged according to subject matter would have been a useful addition. And considering the very high level of erudition that the author displays in the extensive footnotes, an annotated bibliography would have been most welcome.

Second, the book contains no discussion of countertrade. Considering the importance of this phenomenon for American businesses trading abroad, as well as the many difficult issues of comparative law and trade policy that it raises, this is a surprising omission. Perhaps the author concluded that the topic simply was too complex to be treated in conjunction with a general exposition on East-West trade and deserved a separate volume. If so, the author's extensive background research and presentation in the present volume suggest that he would have something valuable to say about countertrade.

JOHN ELLICOTT

Of the District of Columbia Bar

MICHAEL BUCKLEY

Of the District of Columbia Bar

Ocean Uses and Their Regulation. By Luc Cuyvers. New York: John Wiley & Sons, 1984. Pp. x, 179. Index. \$29.95, cloth; \$19.95, paper.

Cuyvers's goal is normative. He wishes to convince the readers of this slim, yet useful, volume that there is a need for more effective management of the ocean regime, i.e., implementation of a procedure for controlling marine uses and resources in light of current and anticipated needs and recognizing these resources' potential exhaustibility. His specific concerns include protecting oceans from oil spills and other highly visible forms of marine pollution, overfishing, unregulated mining and the consequences of too many ships and perhaps even too many tourists.

To make his case a convincing one, Cuyvers begins his book with an inventory of past uses of the oceans and an assessment of the effectiveness of previous attempts at regulation. For example, his analysis of past fishery management schemes suggests that they have suffered from "their single-minded pursuit of the largest physical yield and their use of politically acceptable regulations" (p. 46). He contends that regulation by means of taxation is preferable.

Throughout the book, Cuyvers very effectively uses maps, charts (e.g., of some organic industrial substances and their effects on the marine envi-

ronment) and statistics (e.g., on marine fisheries catches, the food potential of the ocean, fish production in the ocean and merchant countries' fleets). Moreover, his graphic presentations (e.g., of the location of ocean mineral resources) are superb.

What is unique about this work, however, is its true interdisciplinary nature; although general, the discussions of the physical, geological, chemical and biological aspects of the ocean are not simplistic. Moreover, the principal uses and resources of the ocean—food, minerals, waste disposal and navigation—are all examined from a scientific viewpoint, as well as from economic, political and legal perspectives. Thus, for example, his discussion of the physical consequences of overfishing is preceded by an exposition on the economics of fishing; likewise, his analysis of marine pollution is preceded by an interesting discussion of the economics of pollution.

Unfortunately for the readers of this *Journal*, the author considers "the legal aspects of ocean development, the somewhat less exciting side of the coin" (p. vii). Not surprisingly, then, chapter 7, which discusses the law of the sea, is only 15 pages long, hardly sufficient to do justice to this wide-ranging and still evolving area of inquiry. Admittedly, there are related discussions interspersed throughout this work, but all are so concise as to be necessarily incomplete. Still, there is much to be said for a clearly written, well-illustrated and documented, interdisciplinary and intelligent work on such a wide-ranging and critical issue.

MICHAEL G. SCHECHTER
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East Asia and the Law of the Sea. By Choon-ho Park. Seoul: Seoul National University Press, 1983. Pp. 445.

The author is a distinguished commentator and teacher in the field of Asian law and here brings together 15 papers, presented in a different format from the originals, from among his publications over the last 10 years. The papers deal with the legal and geopolitical aspects of offshore oil development and related problems in northeast and Southeast Asia and are arranged in thematic or chronological order within each subheading. Understanding of the problems involved in each of the studies is greatly assisted by the liberal provision of maps.

The first subject discussed is the northeast Asia seabed controversy. In 1969 it was reported that some areas of the Yellow Sea and the East China Sea appeared to have great oil potential. The coastal states, the People's Republic of China, the Republic of Korea, Japan and the Republic of China (Taiwan), unilaterally established boundaries that overlapped one another. The problem is complicated because there exists, as the author observes, almost every conceivable difficulty that the UN Convention on the Law of the Sea was intended to prevent or solve. There are differences in physical factors, for example, the presence of outlying islets and a trough; there also

are greater mutual distrust and wider disparity in economic capabilities than have characterized other similar disputes, for example, the *North Sea Continental Shelf* cases. Further, there is a territorial dispute between the People's Republic of China and Japan over the ownership of the Tiao-yu-t'ai Islands.

Fishing in the Yellow Sea and the East China Sea has also resulted in difficulties, and their analysis is the subject of the second chapter. There are four agreements intended to regulate the fisheries in these seas, but none of them is binding on all the coastal states, nor is any state a party to all four. Further, the states differ from one another in maritime practice, for example, in delimiting the territorial sea and in relation to the exclusive economic zone. There is, of course, a danger that the resources of the area will be depleted. In his third chapter, the author considers the prospective emergence of an exclusive 200-mile exclusive economic zone in this area and the effects on the coastal states. This is followed by a paper on the joint development scheme between Japan and the Republic of Korea to exploit mineral resources in the East China Sea.

In the fifth chapter, the author considers matters relating to the use of the sea and its resources off Korea. He discusses the territorial sea claims of the Republic of Korea, its fishing problems with Japan, the seabed controversy in the Yellow and East China Seas and the impact of the 200-mile regime on the Republic of Korea.

The writer then examines the 50-mile military boundary zone proclaimed by North Korea on August 1, 1977; this study was originally published in this *Journal*.¹ It is followed by an examination of the legal status of the Paracel and Spratly Islands, which in 1974 gave rise to a skirmish between forces of the People's Republic of China and the Republic of Vietnam. There have also been claims by Japan and by France on behalf of Vietnam. Further, the Republic of China and the Republic of the Philippines have controlled some of the islets in the Spratlys. The author sets out the details of the geographical, historical and legal background necessary for some understanding of the dispute. He develops this discussion in the eighth chapter, entitled "The South China Sea Disputes: Who Owns the Islands and the Natural Resources." The book then moves clearly into the Chinese theater, with chapters on China's maritime jurisdiction, offshore oil development in the China seas, oil and Asian rivals, and three chapters on aspects of China's oil policy. This is followed by a final chapter on Indonesia's oil relations with the United States and Japan.

This volume contains a wealth of legal, political, historical and geographical information that will be of particular utility to any researcher interested in these issues. The bringing together of these papers by the eminent author will serve as a valuable contribution to the study of maritime problems in East Asia.

DAVID FLINT

The New South Wales Institute of Technology

¹ 72 AJIL 866 (1978).

BRIEFER NOTICES

The Unwanted: European Refugees in the Twentieth Century. By Michael R. Marrus. (New York and Oxford: Oxford University Press, 1985. Pp. xii, 414. Index. \$24.95.) The author is a professor of history at the University of Toronto. In contrast to other works, his deals not only with transfrontier movements but also with movements within countries. According to the author, the term "refugee" was not used until the middle of the 19th century. Apart from the Huguenots, there were only individual exiles, revolutionaries or political dissidents. The first mass movement was the emigration of Jews from Russia in the second half of the 19th century. It was, in the author's view, an intermediate case between voluntary emigration and a refugee movement. By 1926 there were an estimated 9.5 million European refugees. The treaties concluded after the First World War created stateless persons and provided for exchanges of populations. In the aftermath of the Second World War, there were 30.6 million displaced persons and 12 million German refugees. Rightly, Elfan Rees has called our century "the century of the homeless man."

This is the most comprehensive description of the European refugee problem known to this reviewer. The book is well written and rich in references. It constitutes a most useful contribution to the literature on the refugee problem.

P. WEIS
Geneva

Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik. (Reprint of the 1st ed. 1934.) By Hans Kelsen. (Aalen: Scientia Verlag, 1985. Pp. xxi, 236. Index. DM 69.) In 1934, 1 year after the National Socialists forced him to leave the University of Cologne, Hans Kelsen published his book "Pure Theory of Law" (*Reine Rechtslehre*), summing up his previous efforts to found a theory of law "purified of all political ideology and all natural scientific elements" (1934 foreword) and including private and public, national and international, law. This book by the famous professor of public law and legal philosophy has now been reprinted (with the "Bibliography of the Pure Theory of Law" by Rudolf A. Metall on pp. 155-222 and a new foreword by Stanley L. Paulson).

Kelsen's legal positivist view aroused immense attention throughout Europe. "There are few philosophers of law in our time whose theories have exercised an influence upon legal philosophy and legal theory comparable with the impact of Kelsen's legal thinking upon the modern theory of law," the Amsterdam Professor van Eikema Hommes stated on the occasion of Kelsen's 100th birthday in 1981.

Although Kelsen issued a completely revised and considerably enlarged second edition of his "Pure Theory of Law"—showing the development of his doctrine—in 1960, the first version maintained its importance as the formulation of the "especially characteristic results" or the "summary" of the "Pure Theory of Law," as Kelsen himself put it in 1960 and 1965, respectively. Because of its concise form this republication of the first edition is a convenient introduction to the work of Hans Kelsen in its original language.

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* Mention here neither assures nor precludes later review.

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OFFICIAL DOCUMENTS

RULING PERTAINING TO THE DIFFERENCES BETWEEN FRANCE AND NEW ZEALAND ARISING FROM THE RAINBOW WARRIOR AFFAIR*

INTRODUCTION

1. On 10 July 1985 a civilian vessel, the "Rainbow Warrior", not flying the New Zealand flag, was sunk at its moorings in Auckland Harbor, New Zealand, as a result of extensive damage caused by two high explosive devices. One person, a Netherlands citizen, Mr. Fernando Pereira, was killed as a result of this action; he drowned when the ship sank.

2. On 12 July, two agents of the French Directorate General of External Security (DGSE) were interviewed by the New Zealand Police and subsequently arrested and prosecuted. On 4 November they pleaded guilty in the District Court in Auckland, New Zealand, to charges of manslaughter and wilful damage to a ship by means of an explosive. They were sentenced to ten years imprisonment each; they are presently serving their sentences in New Zealand prisons.

3. A communique issued on 22 September 1985 by the Prime Minister of France confirmed that the "Rainbow Warrior" had been sunk by agents of the DGSE upon instructions. On the same day, the Minister of External Affairs of France pointed out to the Prime Minister of New Zealand that France was ready to undertake reparations for the consequences of that action. He also declared he was ready, as the Prime Minister of New Zealand had already suggested, to meet with the Deputy Prime Minister of New Zealand on 23 and 25 September in New York. Such a meeting did take place for the purpose of discussing the possible ways to find a solution to the problems arising from the Rainbow Warrior affair.

4. A number of subsequent meetings took place between officials of the two countries in the months that followed, but it did not prove possible to reach a settlement.

5. In June 1986 I was formally approached by the Governments of France and New Zealand, who referred to me all the problems between them arising from the Rainbow Warrior affair for a ruling which both sides agreed to abide by. I then informed both Governments that I was prepared to undertake such a task. On 19 June, in Paris and in Wellington, both Governments made public announcements to that effect, and in New York on the same day I publicly confirmed that I was willing to undertake that task and to make my ruling available to the two Governments in the very near future.

RULING

The issues that I need to consider are limited in number. I set out below my ruling on them which takes account of all the information available to me. My ruling is as follows:

* This ruling by the United Nations Secretary-General is dated July 6, 1986.

1. *Apology*

New Zealand seeks an apology. France is prepared to give one. My ruling is that the Prime Minister of France should convey to the Prime Minister of New Zealand a formal and unqualified apology for the attack, contrary to international law, on the "Rainbow Warrior" by French service agents which took place on 10 July 1985.

2. *Compensation*

New Zealand seeks compensation for the wrong done to it and France is ready to pay some compensation. The two sides, however, are some distance apart on quantum. New Zealand has said that the figure should not be less than US Dollars 9 million, France that it should not be more than US Dollars 4 million. My ruling is that the French Government should pay the sum of US Dollars 7 million to the Government of New Zealand as compensation for all the damage it has suffered.

3. *The Two French Service Agents*

It is on this issue that the two Governments plainly had the greatest difficulty in their attempts to negotiate a solution to the whole issue on a bilateral basis before they took the decision to refer the matter to me.

The French Government seeks the immediate return of the two officers. It underlines that their imprisonment in New Zealand is not justified; taking into account in particular the fact that they acted under military orders and that France is ready to give an apology and to pay compensation to New Zealand for the damage suffered.

The New Zealand position is that the sinking of the "Rainbow Warrior" involved not only a breach of international law, but also the commission of a serious crime in New Zealand for which the two officers received a lengthy sentence from a New Zealand court. The New Zealand side states that their release to freedom would undermine the integrity of the New Zealand judicial system. In the course of bilateral negotiations with France, New Zealand was ready to explore possibilities for the prisoners serving their sentences outside New Zealand.

But it has been, and remains, essential to the New Zealand position that there should be no release to freedom, that any transfer should be to custody, and that there should be a means of verifying that.

The French response to that is that there is no basis either in international law or in French law on which the two could serve out any portion of their New Zealand sentence in France, and that they could not be subjected to new criminal proceedings after a transfer into French hands.

On this point, if I am to fulfil my mandate adequately, I must find a solution in respect of the two officers which both respects and reconciles these conflicting positions.

My ruling is as follows:

(a) The Government of New Zealand should transfer Major Alain Mafart and Captain Dominique Prieur to the French military authorities. Immediately thereafter, Major Mafart and Captain Prieur should be transferred

to a French military facility on an isolated island outside of Europe for a period of three years.

(b) They should be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments. They should be isolated during their assignment on the island from persons other than military or associated personnel and immediate family and friends. They should be prohibited from any contact with the press or other media whether in person or in writing or in any other manner. These conditions should be strictly complied with and appropriate action should be taken under the rules governing military discipline to enforce them.

(c) The French Government should every three months convey to the New Zealand Government and to the Secretary-General of the United Nations, through diplomatic channels, full reports on the situation of Major Mafart and Captain Prieur in terms of the two preceding paragraphs in order to allow the New Zealand Government to be sure that they are being implemented.

(d) If the New Zealand Government so requests, a visit to the French military facility in question may be made, by mutual agreement by the two Governments, by an agreed third party.

(e) I have sought information on French military facilities outside Europe. On the basis of that information, I believe that the transfer of Major Mafart and Captain Prieur to the French military facility on the isolated island of Hao in French Polynesia would best facilitate the enforcement of the conditions which I have laid down in paragraphs (a) to (d) above. My ruling is that that should be their destination immediately after their transfer.

4. Trade Issues

The New Zealand Government has taken the position that trade issues have been imported into the affair as a result of French action, either taken or in prospect. The French Government denies that, but it has indicated that it is willing to give some undertakings relating to trade, as sought by the New Zealand Government. I therefore rule that France should:

(a) Not oppose continuing imports of New Zealand butter into the United Kingdom in 1987 and 1988 at levels proposed by the Commission of the European Communities in so far as these do not exceed those mentioned in document COM(83)574 of 6 October 1983 that is to say, 77,000 tonnes in 1987 and 75,000 tonnes in 1988; and

(b) Not take measures that might impair the implementation of the agreement between New Zealand and the European Economic Community on Trade in Mutton, Lamb and Goatmeat which entered into force on 20 October 1980 (as complemented by the exchange of letters of 12 July 1984).

5. Arbitration

The New Zealand Government has argued that a mechanism should exist to ensure that any differences that may arise about the implementation of the agreements concluded as a result of my ruling can be referred for binding decision to an arbitral tribunal. The Government of France is not averse to that. My ruling is that an agreement to that effect should be concluded and provide that any dispute concerning the interpretation or application of the other agreements, which it has not been possible to resolve through the diplomatic channel, shall, at the request of either of the two Governments, be submitted to an arbitral tribunal under the following conditions:

(a) Each Government shall designate a member of the tribunal within 30 days of the date of the delivery by either Government to the other of a written request for arbitration of the dispute, and the two Governments shall, within 60 days of that date, appoint a third member of the tribunal who shall be its chairman;

(b) If, within the times prescribed, either Government fails to designate a member of the tribunal or the third member is not agreed, the Secretary-General of the United Nations shall be requested to make the necessary appointment after consultations with the two Governments by choosing the member or members of the tribunal;

(c) A majority of the members of the tribunal shall constitute a quorum and all decisions shall be made by a majority vote;

(d) The decisions of the tribunal, including all rulings concerning its constitution, procedure and jurisdiction, shall be binding on the two Governments.

6. The two Governments should conclude and bring into force as soon as possible binding agreements incorporating all of the above rulings. These agreements should provide that the undertaking relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur should be implemented at the latest on 25 July 1986.

7. On one matter I find no need to make a ruling. New Zealand, in its written statement of position, has expressed concern regarding compensation for the family of the individual whose life was lost in the incident and for Greenpeace. The French statement of position contains an account of the compensation arrangements that have been made; I understand that those assurances constitute the response that New Zealand was seeking.

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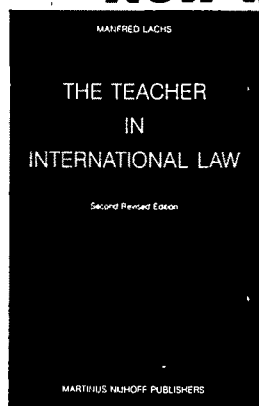
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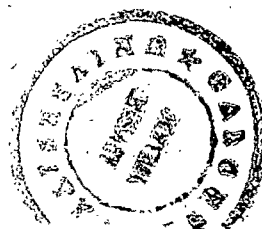
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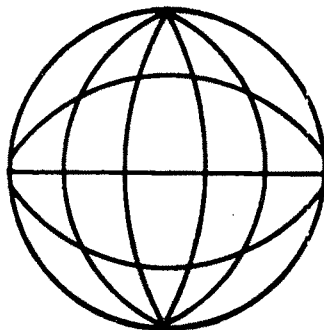
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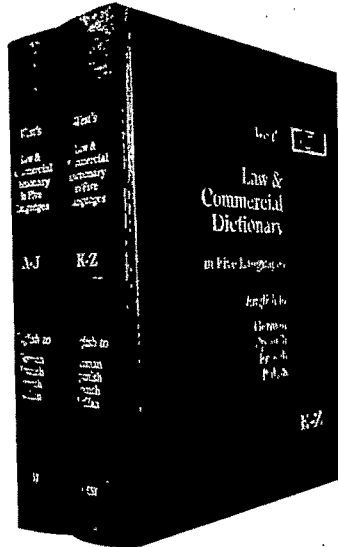
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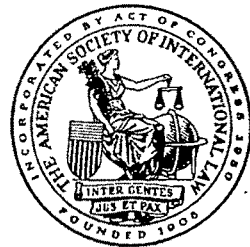
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AJIL is published in January, April, July, and October and is supplied to all members of the American Society of International Law. The annual subscription to nonmembers of ASIL is \$50.00, plus \$4.00 for all foreign subscriptions. Available back numbers of AJIL will be supplied at \$15.00 each. (\$30 of membership fee is allotted to AJIL subscription.)

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INNOCENT PASSAGE AND THE 1982 CONVENTION: THE INFLUENCE OF SOVIET LAW AND POLICY

By W. E. Butler*

On April 28, 1983, the Soviet Union became the first maritime country of consequence and the largest sea power signatory to the 1982 United Nations Convention on the Law of the Sea¹ to enact legislation implementing the provisions of that instrument regulating the innocent passage of foreign warships. The stature of the Soviet Union within the framework of the Convention and the policy changes embodied in the 1983 legislation confer a special importance on these new Rules,² whose text and interpretation will become a standard emulated by other countries. The present article examines the text of the Rules against the background of previous Soviet legislation, the 1982 Convention and its negotiating history, and the application of the Rules.

DEVELOPMENT OF SOVIET ATTITUDES TOWARD INNOCENT PASSAGE

Early Soviet legislation, practice and doctrine in respect of innocent passage has been examined by the present writer elsewhere.³ The Instruction for the Navigation of Vessels in Coastal Waters within Artillery Range of Shore Batteries in Peacetime, of July 5, 1924, provided that both Soviet and foreign merchant vessels had the right to unhindered passage within Soviet territorial waters save in special zones.⁴ The 1927 statute on the state boundary consolidated the nature and scope of coastal jurisdiction over the passage of foreign vessels without mentioning the expression "innocent passage";⁵ and the 1936 Rules for the Entrance of Vessels into Areas of Restricted

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¹ *Opened for signature* Dec. 10, 1982, *reprinted in* UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UN Pub. Sales No. E.83.V.5).

² For the Rules, see note 28 *infra*.

³ W. E. BUTLER, THE LAW OF SOVIET TERRITORIAL WATERS (1967); THE SOVIET UNION AND THE LAW OF THE SEA (1971); NORTHEAST ARCTIC PASSAGE (1978); and others. *See also* THE USSR, EASTERN EUROPE, AND THE DEVELOPMENT OF THE LAW OF THE SEA (W. E. Butler ed. 1983-).

⁴ ZAKONODATEL'STVO I MEZHDUNARODNYE DOGOVORY SOIUZA SSR I SOIUZNYKH RESPUBLIK O PRAVOM POLOZHENII INOSTRANNYKH FIZICHESKIKH I IURIDICHESKIKH LITS 432 (V. V. Egor'ev et al. comps., 1926), *translated in* 6 SOVIET STATUTES AND DECISIONS [hereinafter cited as SS&D] 58 (1969).

⁵ SZ SSSR [SOBRANIE ZAKONOV I RASPORIAZHENII SOIUZA SOVETSKIKH SOTSIALISTICHESKIKH RESPUBLIK], No. 62, 1927, item 625, *translated in* 6 SS&D at 30.

Movement, which superseded the 1924 Instruction, but whose text is not available, reportedly also made no reference to innocent passage.⁶

On the basis of the 1927 statute on the state boundary, Provisional Rules for Foreign Warships Visiting USSR Waters were promulgated on March 28, 1931.⁷ Although the provisional rules required previous authorization from the Soviet Government for visits by foreign warships, they were applicable only to arrivals in Soviet ports and internal waters and did not extend to foreign warships merely traversing the territorial waters of the USSR. Soviet legislation and practice, in other words, was fully consistent with the prevailing customary rules of international law governing the right of innocent passage in the territorial waters of a coastal state.

Doctrinal writings by Soviet jurists took, on the whole, the same view. M. Ia. Sheptovitskii wrote in 1936 that authorization was needed only to enter the internal waters of the USSR,⁸ and V. N. Durdenevskii reinforced that view a decade later: "Foreign warships also may pass in territorial waters without receiving previous authorization therefor and without a prior notification concerning the passage. . . . The practice of States shows that in peacetime States generally do not hinder the passage of foreign warships in their territorial waters."⁹

On the eve of the Second World War, however, another view began to emerge in Soviet doctrine. Keilin and Vinogradov suggested that the correct, albeit not generally accepted, position should be that foreign warships must obtain the prior consent of the coastal state to pass through the territorial waters of that state.¹⁰ By the late 1940s, that view achieved increasing prominence. In his dissenting opinion to the Judgment of the International Court of Justice in the *Corfu Channel* case, Judge S. B. Krylov concluded that "the right to regulate the passage of warships through its territorial waters appertains to the coastal State."¹¹ Judge Krylov supported his view by citing the absence of an international convention regulating the question, the divergent practices of states in general—hence the absence of a customary rule of international law—and the opinions of individual Western jurists who opposed the recognition of such a right.

In 1954 A. N. Nikolaev undertook in his monograph on territorial waters to reinterpret the 1931 provisional rules so that they also would apply beyond the internal waters of the USSR.¹² A. D. Keilin supported the doctrine of prior authorization on the ground that a coastal state has no interest in

⁶ A. T. UUSTAL', MEZHDUNARODNO-PRAVOVOI REZHIM TERRITORIAL'NYKH VOD 61 (1957).

⁷ For the text, see VOENNO-MORSKOI MEZHDUNARODNO-PRAVOVOI SPRAVOCHNIK 106 (A. S. Bakhov ed. 1956).

⁸ M. IA. SHEPTOVITSKII, MORSKOE PRAVO 51 (1936).

⁹ MEZHDUNARODNOE PRAVO 257 (V. N. Durdenevskii & S. B. Krylov eds. 1947).

¹⁰ A. D. KEILIN & P. P. VINOGRADOV, MORSKOE PRAVO (1939).

¹¹ *Corfu Channel* (UK v. Alb.), Merits, 1949 ICJ REP. 4, 74 (Judgment of Apr. 9) (Krylov, J., dissenting).

¹² A. N. NIKOLAEV, PROBLEMA TERRITORIAL'NYKH VOD V MEZHDUNARODNOM PRAVE 214 (1954).

allowing the passage of foreign warships that is comparable to the commercial advantages accruing from the passage of merchant vessels.¹³

On the international level, the draft articles on the territorial sea and contiguous zone submitted by the International Law Commission to the United Nations General Assembly contained a provision permitting the coastal state to make the passage of warships through the territorial sea subject to previous authorization or notification.¹⁴ A proposal to delete this article from the draft Convention on the Territorial Sea was defeated, although it was considerably weakened by the deletion of the term "authorization," as proposed by Denmark. However, even the amended version failed to secure the necessary votes at the 1958 Conference on the Law of the Sea, which left only Article 23 in the 1958 Geneva Convention. It stated: "If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea."¹⁵

The Soviet Union took several measures to consolidate its previously expressed position on the issue. First, it entered a reservation to Article 23, declaring that the coastal state "has the right to establish a procedure of authorisation for the passage of foreign warships through its territorial waters."¹⁶ Second, it explicitly provided an authorization procedure for foreign warships in Article 16 of the 1960 statute on the state boundary,¹⁷ which superseded the statute of 1927. Third, the provisional rules of 1931 were replaced by a set of rules in 1960 which did stipulate that consent for the passage of foreign warships in Soviet territorial waters must be requested through diplomatic channels 30 days prior to the proposed visit.¹⁸ Fourth, an Instruction on innocent passage for fishing vessels was adopted.¹⁹

Paradoxically, perhaps, as the international community was completing the codification of the law of the sea in the form of the Geneva Conventions and the Soviet Union was adjusting its legislation to give effect to its interpretation of the Conventions, the stature of the USSR as a sea power was undergoing dramatic transformation in all respects—merchant shipping, high seas fishing, naval power and marine research. Attitudes congenial to a land power with a vast vulnerable coastline had become obsolete.²⁰ In

¹³ A. D. KEILIN, *SOVETSKOE MORSKOE PRAVO* 64 (1954).

¹⁴ Report of the International Law Commission to the General Assembly, 11 UN GAOR Supp. (No. 9) at 22, UN Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. INT'L L. COMM'N 253, 276, UN Doc. A/CN.4/SER.A/1956/Add.1.

¹⁵ Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 UST 1606, TIAS No. 5639, 516 UNTS 205.

¹⁶ *VEDOMOSTI SSSR*, No. 43, 1964, item 472, translated in 6 SS&D at 62.

¹⁷ *VEDOMOSTI SSSR*, No. 34, 1960, item 324, translated in 6 SS&D at 63.

¹⁸ *IZVESHCHENIIA MOREPLAVATELIAM*, No. 1, 1966, item 14, translated in 6 SS&D at 65.

¹⁹ Confirmed by the Ministry of Fisheries on Jan. 16, 1961. For the text, see V. F. MESHERA, *NORMATIVNYE DOKUMENTY PO MORSKOMU PRAVU* 133 (1965), translated in 8 ILM 333 (1969).

²⁰ Butler, *The USSR and the Limits to National Jurisdiction over the Sea, 1970-72*, in *LIMITS TO NATIONAL JURISDICTION OVER THE SEA* 177 (G. T. Yates & J. H. Young eds. 1974).

1967 measures were set in motion that led to the convocation of the Third United Nations Conference on the Law of the Sea (UNCLOS III), whose results are considered here with regard to innocent passage.

DELIBERATIONS AT UNCLOS III

The early years of negotiation at the Third UN Conference on the Law of the Sea produced substantial consensus rather rapidly that a new convention on the law of the sea should clarify the concept of innocent passage, on the one hand, by producing an objective list of activities that, if engaged in by a passing vessel, would be prejudicial to the peace, good order or security of the coastal state, and, on the other hand, by developing a list of matters on which the coastal state was competent to enact regulations. The Ukrainian delegate said on July 17, 1974:

With regard to the innocent passage of foreign vessels through territorial waters, his delegation thought that the provisions of the Geneva Convention were fully in force, but that the concept of innocent passage must be defined more precisely; in particular, acts which would be incompatible with it must be specified. It was likewise necessary to clarify the question of conformity with the laws and regulations established by the coastal State with regard to innocent passage.²¹

Clarification was understood to mean that broad support prevailed amongst the delegations for retaining the relevant provisions (Articles 14-23) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. Little support was believed to exist for imposing a requirement of advance notification for the innocent passage of tankers, nuclear-powered ships or ships carrying nuclear weapons.²² The consensus on this approach and on the substance of the text produced transcended East and West. Efforts were made by some delegations to limit innocent passage further after 1976, but by then the position of the principal maritime powers had been forged. A belated and concerted assault upon the provisions in respect of innocent passage led by the Philippines and others with a view to allowing the coastal state the right to require prior authorization or notification before warships might enter its territorial sea failed at the 10th session (1981) of the conference. Western states were joined by the Eastern bloc in opposition to this change.

At the 11th session (1982), Romania, Morocco, the Philippines, Panama, and others supported a formal proposal to amend Article 21 of the Draft Convention (Laws and Regulations of the Coastal State Relating to Innocent Passage) by requiring prior authorization or notification for a warship to enter the territorial waters of another state. The proposed amendment encountered strenuous opposition from the major maritime powers in the East

²¹ 5 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: DOCUMENTS 252-53 (R. Platzöder ed. 1982-) (Mr. Sapozhnikov, 2d Comm., July 17, 1974).

²² REPORTS OF THE UNITED STATES DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 95 (M. Nordquist & C. Park eds. 1983).

and the West both on its merits and on the ground that the delicately balanced positions in the Draft Convention ought not to be disturbed. Informal meetings with interested delegations were convened to explore a compromise under the leadership of the Chairman of the Second Committee of the conference. As none of the suggestions for compromise drew broad support, the Chairman concluded that a consensus change to Article 21 could not be achieved.²³

Two formal amendments to Article 21 were then submitted during the fourth stage of the 11th session of the conference. One, sponsored by Gabon, would have permitted coastal states to require prior authorization or notification for foreign warships to enter the territorial sea. The second, sponsored by some 30 states, would have introduced the word "security" into paragraph 1(h) of Article 21 to enable the coastal state to issue regulations regarding its security that would encompass warships or other types of vessel entering the territorial sea. After intensive consultations conducted by the President of the conference, the sponsors of the amendments agreed not to press them on condition that the President make a statement to the effect that in the sponsors' view the existing text of Article 21 was without prejudice to the right of coastal states to safeguard their security interests in accordance with Article 19 (Meaning of Innocent Passage) and Article 25 (Rights of Protection of the Coastal State). The statement was deemed to be compatible with those provisions of the Draft Convention, carefully negotiated to preserve the preexisting law, that precluded discrimination by a coastal state against the general rights of warships to exercise innocent passage.²⁴

THE 1982 CONVENTION AND SOVIET LEGISLATION

The provisions of the 1982 Convention respecting innocent passage had begun to be incorporated into Soviet legislation even before the Convention was opened for formal signature. On November 24, 1982, the Supreme Soviet of the USSR adopted the Law on the State Boundary of the USSR, which entered into force on March 1, 1983.²⁵ It superseded the 1960 statute on the state boundary. The 1982 law established a 12-nautical mile breadth for the territorial waters (territorial sea)²⁶ of the Soviet Union measured from the lowest ebb-tide line on both the mainland of and islands belonging to the USSR or from straight baselines joining appropriate points whose coordinates are confirmed in a procedure established by the USSR Council of Ministers (Article 5).²⁷

²³ *Id.*

²⁴ *Id.* at 546-47.

²⁵ *VEDOMOSTI SSSR*, No. 48, 1982, item 891, translated in Butler (ed.), *supra* note 3, and in *COLLECTED LEGISLATION OF THE USSR AND CONSTITUENT UNION REPUBLICS* (Butler ed. 1979-).

²⁶ The 1982 law uses "territorial waters" and "territorial sea" as synonyms to avoid confusion that might arise since both terms were employed in earlier legislation and perhaps to put to rest the nuances of the past that were associated with one term or the other.

²⁷ Geographic coordinates fixing the points for straight baselines to be drawn off Soviet coasts in order to determine the breadth of the territorial sea, economic zone and continental shelf of the Soviet Union were confirmed by decree of the USSR Council of Ministers on Feb. 7,

Foreign Ships in General

The definition of innocent passage under the 1982 Convention (Article 18) is reproduced in the 1982 law (Article 13), except that the latter makes no reference to roadsteads or to port facilities beyond the internal waters of the USSR. Foreign nonmilitary vessels are to enjoy the right of innocent passage in accordance with the legislation and international treaties of the USSR and should follow the ordinary navigational course, or the course recommended by competent Soviet agencies, as well as sea corridors and traffic separation schemes.

Innocent passage for the purpose of putting in to Soviet roadsteads and ports open to foreign nonmilitary vessels is treated in Article 14. A list of such ports and roadsteads and the procedure for arrival and sojourn therein are the subject of separate legislation and of rules published in *Notices to Mariners*. Both foreign nonmilitary vessels and warships are required, while exercising the right of innocent passage, to observe rules for radio communications, navigation and customs, and port, sanitary, and other rules (Article 15); to refrain from engaging in fishing and other trades, research and survey activities unless expressly authorized by competent Soviet agencies or international treaties of the USSR (Article 16); to avoid areas closed to navigation (Article 19); and to avoid using waters within the state boundary for unauthorized economic activities or in violation of temporary restrictions (Article 18) or quarantine imposed to prevent the spread of contagious diseases (Article 19).

Foreign nonmilitary vessels and warships that traverse Soviet territorial waters in violation of the established rules are deemed to be "violators of the USSR State boundary" (Article 20), for which they and/or the individuals on board responsible for the violation are liable under Soviet criminal, administrative or other legislation (Article 40). Enforcement of Soviet coastal regulations is chiefly the responsibility of the border guard, although a myriad of other agencies (e.g., fishery supervision agencies, customs officials, water conservancy agencies) exercise special enforcement powers. The 1982 law defines (Articles 28 and 29) at length the basic duties and rights of the border guard. Amongst the basic duties referring expressly to a foreign presence (although potentially all relate to such) are the duties to ensure the fulfillment of obligations arising from international treaties of the Soviet Union relating to the regime of the USSR state boundary (Article 28(7)) and to control the observance by Soviet and foreign nonmilitary vessels and warships of the established regime for navigation and sojourn in Soviet territorial waters (territorial sea) and internal waters, and in the Soviet sector of frontier river waters, lakes and other waters (Article 28(10)).

Within the territorial waters (territorial sea) of the USSR, the border

1984 for the Pacific Ocean, Sea of Japan, Okhotsk Sea and Bering Sea, and on Jan. 15, 1985 for the Baltic Sea, Black Sea and northern Arctic Ocean. See [P. D. Barabolia, in] ZAKON SOIUZA SOVETSKIKH SOTSIALISTICHESKIKH RESPUBLIK O GOSUDARSTVENNOI GRANITSE SSSR: POLITIKO-PRAVOVOI KOMMENTARIJ 25 (1986) [hereinafter cited as KOMMENTARIJ].

guard has broadly defined powers to verify documents, inspect cargo, conduct inquiries regarding violations of the USSR state boundary—including searches, detention of suspects, interrogations—and impose appropriate administrative sanctions, and to subject foreigners and stateless persons to administrative detention if they violate the state boundary and a criminal proceeding is not justified (Article 29). In addition, certain rights are enumerated with respect to foreign nonmilitary vessels in the territorial waters (territorial sea), including: to ask a foreign vessel to display its flag and to inquire why a vessel is putting in to Soviet waters; to suggest that a vessel change course if it is proceeding to an area closed to navigation; to stop and inspect a vessel that fails to respond to signals of inquiry, is in an area closed to navigation, violates other rules for arriving, sojourning in or leaving USSR waters, or engages in unlawful activities. Inspection includes verification of ship's and navigation documents, as well as those relating to the crew, passengers and cargo, and examination of the premises of the vessel. When inspection is completed, a vessel may be allowed to continue, requested to leave Soviet waters, or detained. An individual on board a vessel who has committed a crime under Soviet law may be detained and handed over to the investigative authorities unless treaties of the USSR provide otherwise. A foreign vessel that has violated the state boundary or the rules on navigation or sojourn in Soviet waters may be pursued until it enters the waters of its own country or those of a third state (Article 30). Furthermore, the 1982 law lays down the grounds on which a foreign nonmilitary vessel may be detained, the requirements for a protocol of detention and the consequences of detention (Articles 31–32).

While these provisions are consistent with the 1982 Convention, they do not reproduce to any appreciable degree its express language.

Warships

The crossing of the USSR state boundary by a foreign warship is a matter that falls within the “regime of the state boundary” and is regulated by the 1982 Law on the State Boundary, other relevant legislation and rules promulgated in *Notices to Mariners* (Articles 8–9). Foreign warships and underwater means of transport are to exercise the right of innocent passage while observing the procedure laid down by the USSR Council of Ministers (Article 13): submarines and other underwater means of transport must navigate while on the surface and under their own flag. Unless otherwise provided, foreign warships entering the internal waters or ports of the USSR must obtain the prior authorization of the Council of Ministers and observe the published rules for visiting such waters. While in Soviet territorial waters, foreign warships are to observe all rules regarding radio communications, navigation, ports and customs, and sanitary control. In the event of forced entry, the nearest Soviet port is to be notified at once (Article 14).

Like nonmilitary vessels, foreign warships may not engage in trade, research or survey activities or sail in restricted areas (Articles 16–17). Similarly, a warship that has penetrated the territorial waters (territorial sea) in violation

of the established rules, or a foreign submarine or underwater vehicle that enters Soviet territorial waters or sojourns therein while submerged, is deemed to be a violator of the USSR state boundary (Article 20). However, special rules operate with regard to foreign warships that violate Soviet laws or rules on navigation and sojourn in Soviet territorial waters (Article 34).

The "special rules" were confirmed by the USSR Council of Ministers on April 28, 1983 under the title "Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the USSR,"²⁸ replacing the rules of June 25, 1960. The 1983 Rules reflect the balance of interests expressed in the 1982 Convention and on one key point—that of previous authorization for a foreign warship to enter Soviet territorial waters—reverse the policy instituted under the 1960 rules, which themselves had incorporated the substance of the Soviet reservation to Article 23 of the 1958 Geneva Convention on the Territorial Sea.

The 1983 Rules proceed from the premise that foreign warships enjoy a right of innocent passage on condition that the procedure for exercising that right is observed. To emphasize that point, the draftsmen begin not by defining innocent passage but by setting out certain procedural requirements: a foreign warship must fly its flag, submarines and other underwater vehicles must navigate on the surface, navigational and other rules must be observed, compulsory pilotage and icebreaker services must be used, areas barred to navigation must be avoided, and a request from the coastal state's authorities to observe the rules must be complied with or the foreign warship may be asked to leave Soviet territory. In addition to the procedures provided in the Rules, a foreign warship must observe the regime of territorial waters of the USSR and international treaties of the USSR (Articles 1–7).

Articles 8–12 of the 1983 Rules incorporate key provisions of the 1982 Convention, sometimes verbatim and in certain instances introducing modifications that sharpen or reconceptualize the text. Here, innocent passage of foreign warships is conditioned upon observance of the 1983 Rules, the laws and rules of the USSR relating to the regime of territorial waters, and international treaties of the USSR; in other words, a "right subject to. . . ." What the 1982 Convention (Article 18(1)) calls the "Meaning of Passage" is described in the 1983 Rules (Article 9) as the "Purposes of Innocent Passage." The essence of Article 18(1) is reproduced in Article 9 of the Rules with the omission of any reference to roadsteads. The 1983 Rules next develop the "concept of innocent passage" (Article 10) by taking the first sentence of Article 19(1) of the Convention and combining it with the text of Article 18(2), thus bridging a distinction drawn in the Convention between the meaning of passage and the meaning of innocent passage. This enables the draftsmen of the 1983 Rules in Article 11 to treat as "conditions of innocent passage" what those who prepared the 1982 Convention enumerated as activities considered to be prejudicial to the peace, good order or security of the coastal state.

²⁸ IZVESHCHENIIA MOREPLAVATELIAM, No. 1, 1984, item 15, at 79, translated in Butler (ed.), *supra* note 3.

Article 22 of the Convention allows a coastal state in the interests of navigational safety to require that foreign vessels use designated sea lanes or traffic separation schemes when exercising their right of innocent passage. When designating sea lanes or prescribing traffic separation schemes, the coastal state is obliged to have regard to the recommendations of the competent international organization, any channels customarily used for international navigation, the special characteristics of particular ships and channels, and the density of traffic. The 1983 Rules (Article 12) make reference in this connection only to innocent passage for the purpose of traversing the territorial sea of the USSR without entering Soviet internal waters or ports, in which case in three seas (the Baltic and Okhotsk Seas and the Sea of Japan) the routes ordinarily used for international navigation are to be followed with observance of prescribed traffic separation schemes.

For a foreign warship, the 1983 Rules, unlike the 1982 Convention, link innocent passage for the purpose of entering or departing from the internal waters or ports of the USSR with the requirement of prior authorization. Herein probably lies the reason for the reconceptualization of innocent passage in the 1983 Rules mentioned above. By shifting emphasis from the "meaning" to the "purposes" of passage, the second "category" of passage defined in Article 18(1)(b) of the Convention—that is, to proceed to or from internal waters or call at a roadstead or port facility outside internal waters—is in fact made wholly subject to the previous authorization process. This approach represents a significant departure from that of the Convention, and in substance amounts to a negation of the notion of innocent passage embodied in Article 18(1)(b).

The 1983 Rules (Articles 34–35) define the concept of "forced entrance" and lay down a procedure to be followed by foreign warships in the event of forced entrance into Soviet territorial waters. The procedural requirement is to notify at once the nearest Soviet port administration and to proceed, if possible, to the nearest Soviet port open to foreign nonmilitary vessels or other point specified by the Soviet vessel sent to render assistance. Except insofar as the forced entrance requires access to Soviet internal waters, it is difficult to see why the foreign warship should be obliged to notify Soviet port authorities unless it chooses to do so. The forced entrance is no less innocent than any other, unless activities proscribed by the 1982 Convention and the 1983 Rules are pursued, in which event the sanction of a request to leave is available.

POST-UNCLOS III SOVIET DOCTRINE ON INNOCENT PASSAGE

Now that Soviet legislation has begun to give effect to the 1982 Convention in anticipation of ratification, doctrinal positions based on something more than merely a restatement or summary of the Convention are beginning to emerge. Notwithstanding the spirit of consensus during UNCLOS III in regard to innocent passage, doctrinal controversy on certain points has had a bearing on state practice (as the discussion of the Black Sea affair, below, will show).

Soviet doctrine widely accepts the position that the legal order at sea is

based on two types of regulation: spatial and functional. The former has to do with the spatial classification of water expanses (e.g., internal waters, territorial sea, economic zone, high seas), and the second with types of use of the sea (e.g., merchant shipping, fishing, navigation of warships). Both interact in such a way that, for example, the legal status of a warship depends upon its functional designation, its actual behavior, the timing of its actions and the status of the waters where it is located at any given time. The "waters," one Soviet jurist wrote, "'color' a particular vessel in a certain 'legal light.'" ²⁹ Yet in characterizing the legal status of a warship in the territorial sea, difficulty has clearly arisen when it comes to evaluating the presence of a vessel in particular waters as opposed to the behavior of that vessel in those waters.

Some of the difficulty originates in contrary theoretical postulates about the nature of the right of innocent passage itself. The commentary to the 1982 USSR Law on the State Boundary declares, for example:

According to Article 75 of the USSR Constitution, the sovereignty of the USSR extends to its entire territory. The 12-mile belt of territorial waters (territorial sea) is also part of the territory. Consequently, the activities of foreign states and their citizens in the territorial waters (territorial sea) of the USSR may occur only with its consent and under the exclusive control of its agencies.

At the same time, the sovereignty of the Soviet state *permits* the right of innocent passage of foreign nonmilitary vessels and warships in territorial waters (territorial sea). ³⁰

The commentator then acknowledges the historical origins of innocent passage (although in dating crystallization of the norm to the early 20th century, he surely is ungenerous by several centuries) and notes that the principle was consolidated in the 1958 Geneva Convention on the Territorial Sea and the 1982 Convention. But the failure to link the two propositions, to acknowledge that the sovereignty of the Soviet (and formerly the Russian) state over its territorial sea, like that of every other state, has long since been limited by customary international law in respect of innocent passage, leaves some writers accentuating sovereignty, and others innocent passage, in discussing the matter. Yet what the 1982 USSR Law on the State Boundary does, as did its predecessors (except, in part, the 1960 statute on the state boundary), is to give further effect to the customary rule of international law within the Soviet legal system.

A. A. Pork, a jurist with the Diplomatic Academy of the USSR Ministry of Foreign Affairs, has taken quite a different approach. Proceeding from the philosophy that led the Soviet Union to enter a reservation to Article 23 of the 1958 Geneva Convention on the Territorial Sea, he argues that there are two basic types of procedures for formalizing the entry of foreign

²⁹ M. I. LAZAREV, *TEORETICHESKIE VOPROSY SOVREMENNOGO MEZHDUNARODNOGO MORSKOGO PRAVA* 128 (1983).

³⁰ KOMMENTARIJ, *supra* note 27, at 49-50 (emphasis added). Yet strong as this statement seems, some Soviet jurists regard it as an attenuation of the doctrine of "absolute state sovereignty" as set out in doctrinal writings of the late 1940s in the USSR.

warships into the territorial sea: by notice or by authorization.³¹ He then develops various propositions that have no basis in customary international law, the 1958 Geneva Conventions, the 1982 Convention or Soviet legislation implementing the Convention. First, he maintains that the principle of coastal state sovereignty allows that state to "regulate, authorize, and, when necessary, prohibit the passage of foreign warships through its territorial waters."³² For small and dependent states that may experience pressure from and the extraction of political concessions by "imperialist powers," Pork advises that an "authorization procedure" may offer a certain guarantee of security. Second, Pork argues that the innocent passage of foreign warships through another's territorial waters without previous authorization or notice may occur only if such waters are international sea routes, that is, "pass through straits which link two high seas or lead from a closed sea to an open sea."³³

Although Pork may have confused transit passage with innocent passage in this utterance, the notion of international sea routes has engaged several Soviet jurists and even state practice. There is no general requirement of customary international law or the 1982 Convention that vessels exercising their right of innocent passage follow customary international shipping routes. Yet Pork suggests:

It must be borne in mind that no international routes whatever pass close to Soviet coasts along which it would be necessary for foreign warships to pass. . . . The specific location of Soviet territory is such that a foreign warship has no need to pass through Soviet territorial waters en route to any neighboring state. The need to pass through Soviet territorial waters may arise only when a foreign ship intends to visit one of the ports of the USSR, but for such a visit the authorization of the Soviet Government is required. In other instances the premeditated entry of foreign warships into Soviet waters must be evaluated as a flagrant breach of the sovereignty of the Soviet state and the laws established thereby. Forced entry is an exception.³⁴

Article 13 of the 1982 Law on the State Boundary requires that foreign *nonmilitary* vessels exercising innocent passage follow the ordinary navigation course (nothing is said about international sea routes) or the course recommended by competent Soviet agencies, as well as sea corridors and traffic separation systems. As for warships, the commentary on the 1982 law indicates that innocent passage is permitted "along routes specified in the [1983] Rules,"³⁵ but does not suggest that in the absence of prescribed routes there is no right of innocent passage (see below).

³¹ A. A. Pork, in B. M. KLIMENKO & A. A. PORK, *TERRITORIJA I GRANITSA SSSR* 141 (1985). In making this point, however, Pork slips into confusing internal waters with territorial waters.

³² *Id.* at 143.

³³ *Id.*

³⁴ *Id.* at 142-43. Pork argues that "in principle" innocent passage has been established for foreign warships only on condition of observing the traffic separation systems in the Baltic Sea, the Okhotsk Sea and the Sea of Japan, drawing on, but not citing, Article 12 of the 1983 Soviet Rules, *supra* note 28.

³⁵ KOMMENTARIJ, *supra* note 27, at 53.

Soviet jurists concerned with merchant shipping take a more internationally minded view of innocent passage. M. A. Gitsu, for example, writes:

In accordance with the customary norm of international law, also simultaneously a treaty norm, the merchant ships of all countries without exception enjoy the right of innocent passage through the territorial waters of foreign states. . . . While preserving the traditional right of innocent passage for foreign vessels, the 1982 Convention somewhat enlarged the content thereof.³⁶

Gitsu stresses the coastal state's responsibilities for securing the safe exercise of innocent passage and not obstructing its enjoyment.

The international law manual for Soviet naval officers gives a view of innocent passage wholly at one with the 1982 Convention. However, in emphasizing the "existence of international norms regulating the right of innocent passage through foreign territorial waters that are uniform for all states," the author notes that the warships of certain states pursuing an "aggressive policy" may use innocent passage to conceal demonstrations of military force against smaller states. As regards Soviet territorial waters, foreign warships, the manual declares, may exercise innocent passage for the purpose of traversing them without entering internal waters, and this "is permitted along routes ordinarily used for international navigation" and in accordance with the traffic separation systems designated for the Baltic and Okhotsk Seas and the Sea of Japan.³⁷

Another naval view is expressed in an article on innocent passage that appeared coincidentally at about the time of the Black Sea affair. By a naval lawyer, Captain R. Sorokin, the article proceeds from the premise that the innocent passage of warships remains "unsettled in the theory of international law and in legislative practice." The 1982 Convention, in his view, struck a balance between the "territorialists" who wished to dispense with innocent passage completely, on one hand, and the United States, which believed that the right of innocent passage could be exercised almost anywhere, on the other. Representing his own position as a kind of middle ground, Sorokin embellishes the 1982 text by stressing two factors not present in the Convention itself. The first has to do with the requirement in the Convention that innocent passage be "expeditious." Sorokin links "expeditious" with both speed and route of the vessel: thus, warships are to traverse territorial waters "along the shortest routes." The second appertains to the right of coastal states under Articles 21 and 22 of the Convention to establish sea corridors and traffic separation systems for passing ships: "The establishment of traffic separation systems and sea corridors has great significance for regulating, on the basis of the provisions of the 1982 Convention, the innocent passage of warships through the territorial waters of coastal states and bal-

³⁶ M. A. Gitsu, in *SOVREMENNOE MORSKOE PRAVO I PRAKTIKA EGO PRIMENENIIA* 40 (I. I. Barinova, V. A. Kiselev & L. M. Fedorov eds., 1985); see also F. S. BOITSOV, G. G. IVANOV & A. L. MAKOVSKII, *MORSKOE PRAVO* 36-38 (2d ed. 1985).

³⁷ Iu. B. Markov, in *MEZHDUNARODNOE MORSKOE PRAVO: SPRAVOCHNIK* 91-92, 97-98 (G. S. Gorshkov ed. 1985).

ancing their interests with the interests of international navigation."³⁸ Where such traffic separation systems and sea corridors have been established by the coastal state, their use by a foreign warship "is a confirmation that the particular ship is exercising innocent passage and not intruding into territorial waters."

Sorokin, in light of the above, defines the innocent passage of warships as "traversing the territorial waters of a coastal state along established routes (recommended courses, corridors, traffic separation systems) specially designated for the innocent passage of foreign ships," while observing coastal state legislation and the 1982 Convention. In the absence of special authorization by the coastal state, warships, he argues, may not use coastal channels and other lanes leading to internal waters, ports and roadsteads, or serving for transport between them. The peculiarity of innocent passage for warships, Sorokin says, is that "their entry into territorial waters at any other places [than those prescribed sea lanes or traffic separation systems] is permissible only in accordance with the provisions of national legislation of the coastal state." As for the Soviet Union, he points out that dozens of traffic separation systems, sea lanes, and recommended routes have been established, but foreign warships may use only those which are expressly mentioned in the respective laws and rules of the USSR. It follows that the traffic separation systems enumerated in Article 12 of the 1983 Soviet Rules on innocent passage for foreign warships are, in Sorokin's view, the sole places where innocent passage is allowed in the seas off the coasts of the USSR.

THE BLACK SEA AFFAIR

The facts of the Black Sea affair, as distilled from American, British and Soviet press reports (the formal Soviet Note delivered to the United States Embassy in Moscow has not been published), suggest the following course of events: on Monday, March 10, 1986, two American naval vessels, the guided-missile cruiser *Yorktown* and the destroyer *Caron*, entered the Black Sea via the Turkish Straits. Their entrance was observed by a Soviet patrol vessel, the *Ladnyi*, which was ordered to continue observation of the American warships.³⁹ In the American view, the voyage of these two vessels was a continuation of a policy of showing the flag in the Black Sea two or three times a year. This policy had been pursued for some time, most recently in December 1985, and American naval vessels on a similar mission had exercised their rights of innocent passage in Soviet territorial waters in November 1984.⁴⁰

At 11:11 hours on Thursday, March 13, the *Yorktown* and the *Caron* entered the territorial waters of the Soviet Union and sailed westward along

³⁸ R. Sorokin, *Mirnyi prokhod voennykh korablei cherez territorial'nye vody*, MORSKOI SBORNIK, No. 3, 1986, at 75-78.

³⁹ V. Lukashin, *Flot proiavit vyderzhku*, Izvestiia, Mar. 23, 1986, at 3, cols. 5-7 (interview of Admiral V. N. Chernavin).

⁴⁰ Halloran, *2 U.S. Ships Enter Soviet Waters Off Crimea to Gather Intelligence*, N.Y. Times, Mar. 19, 1986, at A1, cols. 4-5. The monograph by Klimenko and Pork, *supra* note 31, was signed to press on Dec. 29, 1984.

the southern Crimean Peninsula, approaching within 6 miles of the coast, for a period of 2 hours and 21 minutes, departing from the territorial waters at 13:32 hours on the same day. The commander of the *Ladnyi* issued a warning to the American vessels that they had violated the territorial waters of the USSR and requested that they leave at once. Receipt of the warning was acknowledged, but the American warships did not change course. Soviet border guard vessels and naval aircraft came to the scene and the Soviet command placed its Black Sea air and naval forces on combat readiness.⁴¹ In its official note of protest, the Soviet Government characterized the incident as provocative and warned against "serious consequences" for which the United States would bear responsibility.⁴² Two press conferences were held by the USSR Ministry of Foreign Affairs to emphasize the gravity of the situation. In their responses to press inquiries, American naval authorities indicated that the two warships were exercising their right of innocent passage in the territorial waters of the Soviet Union.⁴³

The course of the American warships indicated on a map published in *Izvestiia* confirms that the passage of the vessels was a lateral one; at no time did they take a course that could be construed as expressing an intention to enter the internal waters or ports of the USSR. In an interview with *Izvestiia* on March 23, 1986, the Commander in Chief of the Soviet Navy, Admiral V. N. Chernavin, indicated that the *Yorktown* and *Caron* had been cautioned as soon as they entered Soviet territorial waters, i.e., that the act of crossing constituted the substance of the violation and not the subsequent behavior of the warships once they were within the territorial sea.

Press commentary on both sides, however, gave much attention to the "behavioral" factor. The initiative seems to have come from the American press. An article in the *New York Times* by R. Halloran appeared under the headline "2 U.S. Ships Enter Soviet Waters Off Crimea to Gather Intelligence." According to Halloran, the two American warships, "heavily equipped" with electronic sensors, entered Soviet territorial waters to test Soviet defenses; the object of the exercise, he said, was to gather intelligence and to assert the right to innocent passage. Statements reported from the United States Department of Defense referred only to innocent passage: "This transit was, to the best of our knowledge, consistent with relevant Soviet law." The *Yorktown*, Halloran wrote, was equipped with an Aegis fire control system that could track hostile ships, submarines and aircraft and select, aim and fire the weapons best suited to destroy each target, as well as helicopters for gathering information. The *Caron* was said to be loaded with additional sensors and listening devices. During their sojourn in Soviet territorial waters, said Halloran, no flight or gunnery drills would be permitted, but sensory and listening activities would be engaged in.⁴⁴ The cor-

⁴¹ Lukashin, *supra* note 39.

⁴² V MID SSSR, *Izvestiia*, Mar. 19, 1986, at 4, col. 8.

⁴³ *Kremlin Protest on US Warships Adds to Superpower Tensions*, *The Times* (London), Mar. 19, 1986, at 5, cols. 1-3.

⁴⁴ Halloran, *supra* note 40.

respondent of the *Washington Post* declared that it was "standard procedure" on such transits "to use electronic gear in order to determine whether new radars have been deployed on shore and to verify the state of readiness of Soviet forces."⁴⁵ The Soviet news agency, TASS, summarized Halloran's version for Soviet readers.⁴⁶

Although the intelligence dimension figured only in the press polemics attending the incident, and there is no evidence available to confirm that *in fact* the two American warships *did* engage in the listening and sensory activities of which they were capable, the possibility of their having done so raises a serious question under the "*Pueblo*" clause⁴⁷ of the 1982 Law of the Sea Convention (Article 19(2)(c)), adopted in the 1983 Rules as subparagraph 4 of Article 11(1), which prohibits "any act aimed at collecting information to the prejudice of the defence or security of the USSR." A voyage undertaken expressly (in whole or in part) to test coastal state defenses, accompanied by any activities to that effect, including passive listening and sensory activities, would seem to fall within the prohibition of the 1982 Convention and the 1983 Rules unless naval powers were prepared to characterize such conduct as part of mutual "confidence-building" exercises amongst countries capable of engaging in reciprocal behavior. On the other hand, careful consideration would need to be given to distinguishing between activities undertaken by any warship for prudent self-protection and those designed affirmatively to prejudice the coastal state.

As noted above, Soviet discontent with the two American warships lay not with their behavior but with their very presence in Soviet territorial waters. The legal grounds appear to rest on a remark attributed in the British press to V. Lomeiko, who conducted the two press conferences in Moscow on this matter, to the effect that the violation had occurred "in the vicinity of the Soviet coast, where there are no traditional seaways."⁴⁸ Admiral Chernavin elaborated on that view: "The innocent passage of foreign warships through the territorial waters of the USSR is permitted only in specially authorized coastal areas which have been announced by the Soviet Government. In a word, there are no such areas in the Black Sea off the coast of the Soviet Union."⁴⁹

This interpretation is not consistent with the 1982 Convention or with the 1983 Rules. Following centuries of practice embodied in customary in-

⁴⁵ Wilson, *Soviet Ships Shadowed U.S. Vessels' Transit*, Wash. Post, Mar. 20, 1986, at A33, cols. 1-4.

⁴⁶ *Provokatsii VMS SShA*, Izvestiia, Mar. 20, 1986, at 4, cols. 6-8. P. D. Barabolia, in characterizing the cruise of the two American warships as illegal, regarded the presence of missiles on the *Yorktown* as a threat of force under Article 19(2)(a) of the 1982 Convention, and also criticized the information-gathering activities of the mission. See Barabolia, *K voprosu o mirnom prokhode cherez territorial'noe more* (unpublished paper delivered to the 3d Anglo-Soviet Symposium on the Law of the Sea, Moscow, June 25, 1986).

⁴⁷ Butler, *The Pueblo Crisis: Some Critical Reflections*, 63 ASIL PROC. 7 (1969).

⁴⁸ Walker, *Moscow Claims US Ships Were Spying*, The Times (London), Mar. 21, 1986, at 7, cols. 1-3.

⁴⁹ Lukashin, *supra* note 39.

ternational law and in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, the international legal system operates on a presumption in favor of the innocent passage of foreign vessels wherever they wish in the territorial sea of the coastal state, subject to the rules of international law and coastal state legislation. The 1982 Convention clarifies to an unprecedented degree the relationship between the vessel in passage and the interests of the coastal state, including the right of coastal states to declare certain areas of the seas closed to shipping, or subject to the observance of certain courses or traffic systems, in the interests of navigational safety. Article 12 of the 1983 Rules stipulates that in the Baltic Sea, the Okhotsk Sea and the Sea of Japan foreign warships are to follow the ordinary navigation routes and certain designated traffic separation schemes. So long as those sea lanes and traffic separation systems take account of subparagraphs (a)-(d) of Article 22(3) of the Convention,⁵⁰ foreign ships are bound to use them. The text of Article 12 of the 1983 Rules is consistent with Article 22 of the 1982 Convention; however, the coastal state need impose such navigational requirements, according to Article 22, only "where necessary"; their absence in no way implies that the right of innocent passage is not applicable. Since the natural configuration of the Black Sea makes navigation possible almost anywhere and traffic density apparently requires no further guidance from the coastal state, under the 1982 Convention and the 1983 Rules a foreign warship in that body of water, and in others where a similar situation exists, has the right of innocent passage. The right of innocent passage is not a "gift" of the coastal state to passing vessels but a limitation of its sovereignty in the interests of international intercourse.

CONCLUSION

Under the view of innocent passage taken herein, there remain with respect to foreign warships, and indeed with respect to vessels having special characteristics, difficult questions regarding the scope of admissible activities in which the passing vessel may engage, irrespective of the benign or otherwise intentions of the flag state. A possible approach to minimizing these problems can be found in the 1961 Soviet Instruction on fishing vessels.⁵¹

Whether fishing vessels enjoyed or should enjoy a right of innocent passage was debated intensively during the 1958 Geneva Conference on the Law of the Sea. The principal concern was that under the guise of innocent passage, a fishing vessel might surreptitiously undertake fishing operations in the territorial sea or fishing zone of the coastal state. The 1961 Soviet Instruction, which apparently is unique, has probably played some part in the development of international law for two reasons. First, the Instruction was addressed to Soviet vessels and laid down the standards of appearance and conduct

⁵⁰ For a brief discussion of traffic separation systems, see Zenkin, *Ustanovlenie morskikh koridorov i sistem razdeleniia dvizheniia v Konventsii OON po morskomu pravu 1982 g. (pravovye aspekty)*, in 2 SOVETSKII EZHEGODNIK MORSKOGO PRAVA 42 (1985).

⁵¹ See *supra* note 19.

expected in the waters of foreign states. A violation could engage not only coastal state sanctions but likewise those of the flag state. Second, the Instruction laid down criteria for a fishing vessel to be, and appear to be, in "passage" condition. Observance of those criteria means that the vessel cannot engage in fishing operations while exercising the right of innocent passage. Subject to striking the appropriate balance on the question of self-protection, this approach may represent the next stage to be explored in connection with the innocent passage of warships. The requirement that submarines must navigate on the surface while exercising the right of innocent passage is a step in the same direction, as is the possibility of establishing precautionary measures for foreign nuclear-powered ships or ships carrying nuclear or other inherently dangerous or noxious substances.

THE GENEVA CONVENTIONS AS CUSTOMARY LAW

By Theodor Meron*

I. INTRODUCTION

At first glance, the question of the customary character of the Geneva Conventions of August 12, 1949 for the Protection of Victims of War¹ might appear academic. After all, the question arises infrequently in view of the universal acceptance of the Conventions as treaties (they are binding on even more states than the Charter of the United Nations).² That the matter may have practical importance, however, was recently brought home by its consideration by the International Court of Justice (ICJ) in the merits phase of *Military and Paramilitary Activities in and against Nicaragua*.³ Moreover, in numerous countries where customary law is treated as the law of the land but an act of the legislature is required to transform treaties into internal law, the question assumes importance if no such law has been enacted.⁴ Failure to enact the necessary legislation cannot affect the interna-

* Of the Board of Editors.

¹ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 6 UST 3114, TIAS No. 3362, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 UST 3217, TIAS No. 3363, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

² There are 164 states parties to the Geneva Conventions. International Committee of the Red Cross, Dissemination No. 5, August 1986. There are 159 member states of the United Nations. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1985, at 3-6, UN Doc. ST/LEG/SER.E/4 (1986).

³ *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

⁴ For a discussion of legislation implementing the Geneva Conventions, see Bothe, *The Role of National Law in the Implementation of International Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 300, 305-06 (C. Swinarski ed. 1984). Many states parties to the Geneva Conventions have not adopted such legislation. Levasseur & Merle, *L'Etat des législations internes au regard des obligations contenues dans les conventions internationales de droit humanitaires*, in DROIT HUMANITAIRE ET CONFLITS ARMÉS 219, 225, 228, 249 (Université Libre de Bruxelles, 1976).

Only 49 governments answered an ICRC inquiry about legislative action taken to repress violations of the Geneva Conventions. This group included some governments that reported having taken no such action, e.g., Indonesia, Iraq, Lebanon, South Africa and Syria. INTERNATIONAL COMMITTEE OF THE RED CROSS, RESPECT OF THE GENEVA CONVENTIONS: MEASURES TAKEN TO REPRESS VIOLATIONS (Reports submitted by the International Committee of the Red Cross to the XXth and XXist International Conferences of the Red Cross) (1971); TWENTY-

tional obligations of these countries to implement the Geneva Conventions; but invoking a certain norm as customary rather than conventional in such situations may be crucial for ensuring protection of the individuals concerned.

Apart from its consequences for the internal law of some countries, the transformation of the norms of the Geneva Conventions into customary law may have certain additional effects. One such effect, already reflected in common Article 63/62/142/158, which concerns denunciation of the Geneva Conventions,⁵ and in Article 43 of the Vienna Convention on the Law of Treaties, is that parties could not terminate their customary law obligations by withdrawal. Another is that reservations to the Conventions may not affect the obligations of the parties under provisions reflecting customary law to which they would be subject independently of the Conventions.⁶ Finally, as customary law, the norms expressed in the Conventions might be subject to a process of interpretation different from that which applies to treaties.

Those who doubt the significance of the question might point out that treaties such as the Geneva Conventions that are accepted by virtually the entire international community through formal and solemn acts have as

FIFTH INTERNATIONAL CONFERENCE OF THE RED CROSS, RESPECT FOR INTERNATIONAL HUMANITARIAN LAW: NATIONAL MEASURES TO IMPLEMENT THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS IN PEACETIME 4 (Doc. C1/2.4/2 1986). See also *id.* at 13.

The Israeli Supreme Court has refused to review the acts of the military Government on the West Bank in light of Geneva Convention No. IV on the ground that the law of the Convention is wholly conventional rather than declaratory of customary law and has not been transformed into the law of the land by legislation. See Cohen, *Justice for Occupied Territory? The Israeli High Court of Justice Paradigm*, 24 COLUM. J. TRANSNAT'L L. 471, 484-89 (1986); Roberts, *What Is a Military Occupation?*, 54 BRIT. Y.B. INT'L L. 249, 253 (1984); Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AJIL 542, 543, 548-50 (1978).

For views suggesting that some provisions of Convention No. IV are declaratory of customary law, see Dissenting Opinion of Justice H. Cohn in *Kawasme v. Minister of Defence*, 35(1) Piskei Din 617, summarized in 11 ISR. Y.B. HUM. RTS. 349, 352-54 (1981); Dinstein, *Expulsion of Mayors from Judea*, 8 TEL AVIV U.L. REV. 158 (Hebrew, 1981); Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 ISR. Y.B. HUM. RTS. 106, 111-12 (1979).

⁵ See *infra* note 13.

⁶ Judge Morelli has emphasized that "the power to make reservations affects only the contractual obligation flowing from the convention," adding that "[i]t goes without saying that a reservation has nothing to do with the customary rule as such. If that rule exists, it exists also for the State which formulated the reservation, in the same way as it exists for those States which have not ratified." *North Sea Continental Shelf Cases* (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 198 (Judgment of Feb. 20) (Morelli, J., dissenting). See also Judgment, *id.* at 38-40. Although the Judgment suggests that no reservations to conventional provisions that are declaratory of customary law are permissible, will the effect of such reservations not be (except as regards rules of *jus cogens*), as between the reserving state and the state accepting the reservation, similar to that produced by a treaty establishing a conventional rule, which displaces, *inter partes*, a rule of customary law? L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 86-87 (2d ed. 1987).

On reservations made by parties to the Geneva Conventions, see Pilloud, *Reservations to the Geneva Conventions of 1949* (pt. 1), INT'L REV. RED CROSS, No. 180, March 1976, at 107 (Pilloud observes that customary law must be applied to determine the "extent" of the reservations made, *id.* at 108); and (pt. 2), INT'L REV. RED CROSS, No. 181, April 1976, at 163.

strong a legal claim to observance as customary law, which by and large rests on the practice of a limited number of states. They might also argue that when a treaty embodies strongly felt humanitarian ideals, it has a moral as well as a legal claim to observance and that transposing its norms into customary law will not necessarily add to its moral claim.

Nevertheless, consensus that the Geneva Conventions are declaratory of customary international law would strengthen the moral claim of the international community for their observance because it would emphasize their humanitarian underpinnings and deep roots in tradition and community values. It may also represent a step in the process that begins with the crystallization of a mere contractual norm into a principle of customary law and culminates in its elevation to *jus cogens* status⁷ (a norm of *jus cogens* can mature also through other processes). The development of the hierarchical concept of *jus cogens* reflects the quest of the international community for a normative order in which higher rights are invoked as a particularly compelling moral and legal barrier to derogations from and violations of human rights. To be sure, the Geneva Conventions already contain some norms that can be regarded as *jus cogens*.⁸

Perhaps our discussion of the relationship between the Geneva Conventions and customary law will also be instructive as regards other multilateral conventions with fewer parties than the Geneva Conventions, such as the two 1977 Additional Protocols, in situations where there has been little significant practice by nonparties.

Obviously, the invocation of a norm as both conventional and customary adds at least rhetorical strength to the moral claim for its observance and affects its interpretation. Thus, to underline the gravity of certain violations, the ICJ observed in the Iranian *Hostages* case that the obligations in question were not merely "contractual . . . but also obligations under general international law."⁹

In the *Nicaragua* case, the question under discussion arose in an unusual context: the multilateral treaty reservation of the United States appeared to preclude the ICJ from applying the Geneva Conventions as treaties. Hence the importance of the Conventions as declaratory of customary law. In its treatment of this issue, the Court refrained from mentioning the two Additional Protocols of 1977 and from considering the way that they confirm, supplement or modify provisions of the Conventions themselves. (While the extent to which the Protocols are declaratory of customary law has begun

⁷ See T. MERON, HUMAN RIGHTS LAW-MAKING IN INTERNATIONAL LAW: A CRITIQUE OF INSTRUMENTS AND PROCESS 194 (1986).

⁸ The International Law Commission (ILC) has observed that "some of [the rules of humanitarian law] are, in the opinion of the Commission, rules which impose obligations of *jus cogens*." Report of the International Law Commission on the work of its thirty-second session, 35 UN GAOR Supp. (No. 10) at 98, UN Doc. A/35/10 (1980).

⁹ United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3, 31 (Judgment of May 24).

A case for a particular interpretation of conventional rules (e.g., Arts. 87 and 100 of Geneva Convention No. III) is strengthened by its concordance with "commonly accepted international law." Public Prosecutor v. Koi, [1968] 1 All E.R. 419, 425.

to attract scholarly attention, this important and difficult question could not be treated in the confines of this essay.)

I shall first consider certain aspects of the *Nicaragua* Judgment that implicate humanitarian law (while protecting the rights of states and governing their duties, humanitarian law also contains a prominent human rights component¹⁰). Then I will consider, in the context of the Geneva Conventions, the broader question of how customary law can develop alongside conventional law. While a rich literature has already been devoted to the relationship between custom and treaty in general, relatively little has been written on the Geneva Conventions as customary law.

II. THE NICARAGUA JUDGMENT

Because of the U.S. multilateral treaty reservation, the circumstances leading to the invocation of the Geneva Conventions as customary law in the *Nicaragua* case are unlikely to recur in future cases before the ICJ. The Court's method is nonetheless of general interest in determining the relationship between custom and treaty. It may also create some perplexity.

Although both Nicaragua and the United States are parties to the Geneva Conventions, Nicaragua refrained from invoking them in the proceedings, perhaps because of its reluctance either to acknowledge that the conflict constitutes an internal armed conflict, or to have its own acts measured by the yardstick of norms contained in common Article 3.¹¹ The Court itself,

¹⁰ See Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AJIL 589, 593 (1983) [hereinafter cited as *Inadequate Reach*]. On the relationship between human rights law and humanitarian law, see also T. MERON, *HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION* 3-70 (1987). See also Kunz, *The Laws of War*, 50 AJIL 313, 316 (1956).

¹¹ See generally the following reports by AMERICAS WATCH COMMITTEE, *VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA 1981-1985* (1985); *VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA 1981-1985, FIRST SUPPLEMENT* (June 1985); *HUMAN RIGHTS IN NICARAGUA 1985-1986* (1986).

Common Article 3 reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 (b) taking of hostages;
 (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for . . .

however, alluded to the relevance to the Geneva Conventions of the U.S. reservation. It did not find it necessary to take a position on the question because, in the Court's view, the conduct of the United States could be judged according to fundamental principles of humanitarian law. In fact, the Court took the U.S. reservation into account by applying certain provisions of the Geneva Conventions as customary rather than contractual obligations.

The Court began its analysis with the general and unchallengeable assessment that the Geneva Conventions represent "in some respects a development, and in other respects no more than the expression," of fundamental principles of humanitarian law.¹² In support of the proposition that certain provisions are declaratory of customary law, the Court mentioned as significant the common article on denunciation,¹³ which emphasizes that, by denouncing the Conventions, no state can derogate from its obligations under international law and the laws of humanity.

The pitfalls of disentangling customary from conventional norms appeared, however, as soon as the Court moved from the general to the specific. The Court focused on two common articles of the Geneva Conventions as reflecting general principles of humanitarian law, or customary law, Articles 1 and 3. Article 1, one of the shortest provisions in the Conventions, provides that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." The Court concluded:

[T]here is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions . . .¹⁴

Quaere. Does Article 1 give expression to a general principle of humanitarian law? To the extent that Article 3 states principles of customary law,

¹² 1986 ICJ REP. at 113, para. 218.

¹³ Common Article 63/62/142/158 provides that the denunciation of one of the Conventions: shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

A state that denounces one of the Geneva Conventions "would nevertheless remain bound by the principles contained in it insofar as they are the expression of . . . customary international law." Pictet (ed.), *infra* note 15, at 413.

¹⁴ 1986 ICJ REP. at 114, para. 220. Elsewhere in its Judgment the Court stated, in the same vein, "that general principles of humanitarian law include a particular prohibition [to refrain from encouraging persons or groups to commit violations of Article 3], accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not." *Id.* at 129, para. 255.

it is obvious that the United States has the duty to respect them, both directly and vicariously, even in the absence of the explicit obligation ("to respect") stated in Article 1. It is less clear whether there is an obligation deriving from the general principles of international law not to "encourage" violations by others ("to ensure respect") of the principles in Article 3.

While the Court's statement is ambiguous, it seems to suggest that when the Geneva Conventions were adopted, Article 1, as well as Article 3, was declaratory of humanitarian principles, by which the Court meant, in this context, customary law. There is no evidence, however, that at that time the negotiating states believed that they were codifying an existing principle of law. They appear to have chosen the words "and to ensure respect" deliberately "to emphasize and strengthen the responsibility of the Contracting Parties."¹⁵ Also, the language "and to ensure respect" was not used in earlier Geneva Conventions.¹⁶ The repetition of such prior usage would have strengthened the claim that the phrase is declaratory of international law.¹⁷ Although this was not the case here, the language "to ensure respect" was

¹⁵ COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 26 (J. Pictet ed. 1952) (emphasis added). The *Commentary* adds that "in the event of a Power failing to fulfil its obligations, the other Contracting Parties . . . may, and should, endeavour to bring it back to an attitude of respect for the Convention." *Id.*

The 1958 *Commentary* on Geneva Convention No. IV went further, adding that "[t]he proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally." COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 16 (O. Uhler & H. Coursier eds. 1958). The 1958 *Commentary* states that the words "in all circumstances" (common Article 1) do not cover the case of civil war and apply to international armed conflicts only. *Id.* See also Pictet (ed.), *supra*, at 27.

¹⁶ Thus, the (Geneva) Prisoners of War Convention, opened for signature July 27, 1929, 47 Stat. 2021, TS No. 846, provided only (Article 82) that "[t]he provisions of the present Convention must be respected by the High Contracting Parties under all circumstances." For an excellent discussion of Article 82, see Condorelli & Boisson de Chazournes, *Quelques Remarques à propos de l'obligation des Etats de "respecter et faire respecter" le droit international humanitaire "en toute circonstances,"* in Swinarski (ed.), *supra* note 4, at 17, 18-19.

The obligation "to ensure respect" is reiterated in Article 1(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature Dec. 12, 1977, 16 ILM 1391 (1977), but not in the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature, Dec. 12, 1977, 16 ILM 1442 (1977).

¹⁷ Baxter has observed that

[t]he passage of humanitarian treaties into customary international law might . . . be justified on the ground that each new wave of such treaties builds upon the past conventions, so that each detailed rule of the Geneva Conventions for the Protection of War Victims is nothing more than an implementation of a more general standard already laid down in an earlier convention, such as the Regulations annexed to Convention No. IV of The Hague.

Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 286 (1965-66).

a conventional precursor to the *erga omnes* principle enunciated by the Court in *Barcelona Traction*,¹⁸ to which we shall return later.

The contemporaneous understanding of the drafters, however, is not necessarily dispositive of the issue; subsequent developments may be relevant. Since 1949 certain third states and the International Committee of the Red Cross (ICRC) have made a practice of issuing appeals to certain governments to respect the Geneva Conventions. Moreover, the ICRC and other international bodies have made general appeals to all states to ensure respect for the Conventions. Despite the salutary efforts of the ICRC to stimulate this practice further, it does not appear to be uniform;¹⁹ and, because of the confidential character of some of the appeals, it is often difficult to ascertain. This confidentiality also suggests that it may be unwise to insist on extensive evidence of practice.

While practically all states are parties to the Geneva Conventions, the practice of states parties may merely indicate that certain states are complying with their treaty obligation "to ensure respect" for the Conventions. As the ICJ observed in the *North Sea Continental Shelf Cases*, little support for the customary law nature of the norms implicated may be found in the conduct of parties that are "acting actually or potentially in the application of [a] Convention."²⁰ Because of the universal acceptance of the Geneva Conventions as treaties, a special difficulty, to be considered in section IV below, is how to refer to state practice apart from these Conventions.

Notwithstanding the Court's rather curious assessment of Article 1 as customary law, as a matter of conventional obligations, the Court's conclusion that the United States may not encourage persons or groups engaged in the Nicaraguan conflict to act in violation of common Article 3 is indisputably correct. The principles of good faith and *pacta sunt servanda*,²¹ which have

¹⁸ *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)* (New Application), 1970 ICJ REP. 4, 32 (Judgment of Feb. 5). See also COMITÉ INTERNATIONAL DE LA CROIX-ROUGE, COMMENTAIRE DES PROTOCOLES ADDITIONNELS 36-37 (Y. Sandoz, C. Swinarski & B. Zimmermann eds. 1986).

¹⁹ Condorelli & Boisson de Chazournes, *supra* note 16, at 27. For a discussion of practice, see *id.* at 26-29.

²⁰ *North Sea Continental Shelf Cases*, 1969 ICJ REP. at 43. Baxter has observed that the Court "quite properly looked exclusively to the conduct of non-parties in attempting to determine whether the treaty, in its law-creating aspect, was binding on all nations." Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 27, 64 (1970 I). See also Bos, *The Identification of Custom in International Law*, 25 GER. Y.B. INT'L L. 9, 27-28 (1982).

On treaties and custom, see generally A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 103-08, 160-64 (1971); H. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 80-84 (1972); Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974-75); Sohn, *The Law of the Sea: Customary International Law Developments*, 34 AM. U.L. REV. 271 (1985). For a reply to Sohn, see Charney, *International Agreements and the Development of International Law*, *id.* at 971. See also Sohn, *Unratified Treaties as a Source of Customary International Law*, in *REALISM IN LAW-MAKING: ESSAYS ON INTERNATIONAL LAW IN HONOR OF WILLEM RIPHAGEN* 231 (A. Bos & H. Siblesz eds. 1986); Sohn, "Generally Accepted" *International Rules*, 61 WASH. L. REV. 1073 (1986).

²¹ See Article 26 of the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969).

deep historical and jurisprudential roots in international law, impose on the United States not only a duty to perform its own obligations as a party to the Conventions (the duty "to respect" in the language of Article 1), but also a duty not to encourage others to violate common Article 3. Beyond this negative duty, the fundamental obligation implies that each state must exert efforts to ensure that no violations of the applicable provisions of humanitarian law ("to ensure respect") are committed, at the very least by third parties controlled by that state.

The duty not to encourage violations finds strong additional support in the *erga omnes* character of the humanitarian norms implicated. Undeniably, the Geneva Conventions, and especially common Article 3, state a great number of basic rights of the human person, some that may have attained the status of *jus cogens*.²² Whether such rights are peremptory or not, under *Barcelona Traction*, "all States can be held to have a legal interest in [their] protection; they are obligations *erga omnes*."²³ This is true, the *Barcelona* Court appeared to suggest, both of norms accepted into the corpus of general international law and of those incorporated into instruments of a universal or quasi-universal character (the Geneva Conventions, of course, fall into this category). The *erga omnes* character of many of the norms in these Conventions implies that third states have not only the right to make appropriate representations urging respect for these norms to states allegedly involved in violating them, but also a duty not to encourage others to violate the norms, and, perhaps, even to discourage others from violating them. Insofar as the norms whose observance is urged are obligations *erga omnes*, the words "to ensure respect" (common Article 1) may indeed reflect a principle of customary law.²⁴

In considering common Article 3, which, according to both its language and its legislative history applies to noninternational armed conflicts but not to international armed conflicts, the Court briefly referred to the problem

²² See Meron, *On a Hierarchy of International Human Rights*, 80 AJIL 1, 15 (1986). Condorelli and Boisson de Chazournes, *supra* note 16, at 33, appear to suggest that the whole of humanitarian law constitutes *jus cogens*.

²³ 1970 ICJ REP. at 32.

²⁴ Judge Schwebel, while questioning whether the delict of "encouragement" exists in customary law, agreed that such encouragement may constitute a violation of the treaty obligation to "ensure respect" for the Geneva Conventions. 1986 ICJ REP. at 388-89 (Schwebel, J., dissenting). Judge Schwebel's observations on customary law find support in the commentary adopted by the ILC in 1978 on Article 27 of its draft articles on state responsibility (pt. 1). The ILC stated that "[i]n the international legal order . . . it is more than doubtful that mere incitement by a State of another State to commit a wrongful act is in itself an internationally wrongful act." Report of the International Law Commission on the work of its thirtieth session, 33 UN GAOR Supp. (No. 10) at 187, 244, UN Doc. A/33/10 (1978). It is less clear, however, whether the ILC intended to address humanitarian norms, which are norms *erga omnes* and sometimes even *jus cogens*. Indeed, in its commentary on Article 33 of its draft articles on state responsibility (pt. 1), adopted in 1980, the ILC indicated that state of (military) necessity cannot excuse noncompliance with rules of humanitarian law even with regard to those obligations which are not obligations *jus cogens*. Report of the International Law Commission on the work of its thirty-second session, *supra* note 8, at 98. The ILC added that a state of necessity cannot be invoked if that is expressly or implicitly prohibited by a conventional instrument, as in the case of humanitarian instruments. *Id.* at 99, 108. Such instruments are obviously nonderogable.

of how the Nicaraguan conflict should be characterized. The Court determined that the conflict between the contras and the Government of Nicaragua was an armed conflict not of an international character and that the acts of the contras against that Government were governed by the law applicable to such conflicts,²⁵ but that "the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts."²⁶ The Court went on to state that

Article 3 . . . defines certain rules to be applied in the armed conflicts of a non-international character. . . . [I]n the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; . . . they . . . reflect what the Court in 1949 called "elementary considerations of humanity" (*Corfu Channel* . . .).

. . . Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character.²⁷

The Court thus viewed the core norms governing noninternational armed conflicts as substantially the same as those that apply to international armed conflicts and found in Article 3, perceived as the "minimum common denominator," a justification for not deciding whether those actions must be examined by the yardstick applicable to international or to noninternational conflicts. The Court's approach gives rise to some questions.

Was the catalog of protections set forth in common Article 3 ever meant to constitute the minimum core of protections applicable in international armed conflicts?²⁸ And while Article 3 may well express the quintessence of humanitarian rules found in other provisions of the Geneva Conventions that govern international armed conflicts, it is not certain that the rules of Article 3 and of those other provisions match each other perfectly, or that all of those humanitarian principles have necessarily attained the character of customary rules of international law.

Article 3 has no antecedents in earlier Geneva Conventions and was clearly viewed in 1949 as marking a "new step" in the development of humanitarian

²⁵ 1986 ICJ REP. at 114, para. 219.

²⁶ *Id.* On the characterization of conflicts in international humanitarian law, see Meron, *Inadequate Reach*, *supra* note 10, at 603; Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, INT'L REV. RED CROSS, No. 230, September-October 1982, at 255, 258; Baxter, *Jus in Bello Interno: The Present and Future Law*, in LAW AND CIVIL WAR IN THE MODERN WORLD 518, 523-24 (J. Moore ed. 1974); Casser, *Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U.L. REV. 145 (1983).

²⁷ 1986 ICJ REP. at 114, paras. 218-19.

²⁸ The ICRC *Commentary* on Geneva Convention No. I emphasizes that Article 3 applies to noninternational conflicts only. Pictet (ed.), *supra* note 15, at 48.

law.²⁹ The ICRC *Commentary* on Geneva Convention No. I states that Article 3 demands respect for rules "already recognized as essential in all civilized countries, and enacted in the municipal law of the States in question, long before the Convention was signed."³⁰ True, some of the provisions of Article 3 are rooted in national legal systems and, perhaps, could have been construed by the Court as constituting "general principles of law recognized by civilized nations," within the meaning of Article 38(1)(c) of its Statute. It is less clear, however, whether norms accepted by states in their national legal systems for normal situations apply equally to internal armed conflicts.

The norms specified in Article 3 have an indisputably humanitarian character, but elementary considerations of humanity have not necessarily attained the status of customary law. Elementary considerations of humanity reflect basic community values whether already crystallized as binding norms of international law or not. Professor Brownlie has observed that "[c]onsiderations of humanity may depend on the subjective appreciation of the judge, but, more objectively, they may be related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy"³¹

As regards the norms in Article 3, a recent authoritative enumeration of customary human rights does not list due process of law, which is the subject of common Article 3(1)(d).³² And an important study of Protocol II explains the deletion of a reference to the law of nations in the version of the Martens clause appearing in that Protocol as reflecting some hesitation about the reach of customary international law in internal conflicts.³³

The Court's discussion of the Geneva Conventions is remarkable, indeed, for its total failure to inquire whether *opinio juris* and practice support the crystallization of Articles 1 and 3 into customary law. Doubts about the Court's position regarding Articles 1 and 3 were expressed by judges as

²⁹ *Id.* at 38, 41.

³⁰ *Id.* at 50.

³¹ I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 29 (3d ed. 1979).

The fact that the content of a norm reflects important considerations of humanity should promote its acceptance as customary law. Thus, in explaining why the Geneva Conventions can be regarded as approaching "international legislation," Sir Hersch Lauterpacht stated, among other reasons, that "many of the provisions of these Conventions, following as they do from compelling considerations of humanity, are declaratory of universally binding international custom." 1 H. LAUTERPACHT, *INTERNATIONAL LAW: COLLECTED PAPERS* 115 (E. Lauterpacht ed. 1970).

³² *RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)* §702 (Tent. Draft No. 6, vol. 1, 1985) [hereinafter cited as *RESTATEMENT (REVISED)*]. For the text of Article 3, see *supra* note 11.

³³

This [deletion of a reference to the law of nations] is justified by the fact that the attempt to establish rules for a non-international conflict only goes back to 1949 and that the application of common Art. 3 in the practice of States has not developed in such a way that one could speak of "established custom" regarding non-international conflicts.

M. BOTHE, K. PARTSCH & W. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 620 (1982). See also *infra* note 52.

eminent as Sir Robert Jennings and Roberto Ago.³⁴ Moreover, the parties to the Geneva Conventions have built a poor record of compliance with the norms stated in Article 3³⁵ and evidence of practice by nonparties is lacking. Nevertheless, it is not so much the Court's attribution of customary law character to both Articles 1 and 3 of the Geneva Conventions that merits criticism; rather, the Court should be reproached for the virtual absence of discussion of the evidence and reasons supporting this conclusion.

Despite the Court's pronouncements on Articles 1 and 3, the status of the Geneva Conventions remains very much as it was before the Judgment: as in the past, the determination to which category—customary or conventional—a particular provision belongs will have to be made *in concreto*. Perhaps the Judgment will be invoked in support of claims to lighten the burden of proof necessary to establish the customary law character of a particular provision of the Conventions because of their humanitarian content (in this sense, the Court's Judgment promotes valuable ethical considerations mentioned in section I above, and contributes to the transformation of certain provisions into customary law); still, it cannot be said that the Court has succeeded in clarifying the status of the Geneva Conventions as customary law.

III. THE ANTECEDENTS

It would be wrong to single out the Court for criticism for its conclusory treatment of certain provisions of the Geneva Conventions as customary law, without discussing supporting evidence or the process by which the Conventions were supposed to be transformed into customary law. Military manuals of leading powers, such as the United States³⁶ and the United King-

³⁴ Judge Jennings stated that there must be at least very serious doubts whether the Geneva Conventions could be regarded as embodying customary law and that the Court's view of Article 3 "is not a matter free from difficulty." 1986 ICJ REP. at 537 (Jennings, J., dissenting). Judge Ago observed that he was

most reluctant to be persuaded that any broad identity of content exists between the Geneva Conventions and certain "fundamental general principles of humanitarian law", which, according to the Court, were pre-existent in customary law, to which the Conventions "merely give expression" (para. 220) or of which they are at most "in some respects a development" (para. 218).

1986 ICJ REP. at 184, para. 8 (Ago, J., sep. op.).

³⁵ See T. MERON, *supra* note 10, at 43-44, 47. See generally Obradovic, *Que faire face aux violations du droit humanitaire?—quelques réflexions sur le rôle possible du CICR*, in Swinarski (ed.), *supra* note 4, at 483; Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict"*, 71 COLUM. L. REV. 37, 52-61 (1971). See also *infra* note 78.

³⁶ The U.S. manual states that the Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention No. IV, 36 Stat. 2277, TS No. 539, 1 Bevans 631, and the "general principles" of the (Geneva) Prisoners of War Convention, *supra* note 16, "have been held to be declaratory of the customary law of war, to which all States are subject." The manual observes that provisions of lawmaking treaties regarding the conduct of warfare "are in large part but formal and specific applications of general principles of unwritten law." U.S. DEP'T OF THE ARMY, *THE LAW OF LAND WARFARE* 6 (Field Manual No. 27-10, 1956). See also 2 U.S. DEP'T OF THE ARMY, *INTERNATIONAL LAW* 249 (Pamphlet No. 27-161-2, 1962).

dom,³⁷ have not attempted to identify those provisions of the Geneva Conventions which are declaratory of customary international law, and the few international judicial decisions on international humanitarian law reveal little, if any, inquiry into the process by which particular instruments have been transformed into customary law.

The leading case on the Hague Regulations of 1907 is the judgment of the International Military Tribunal (IMT) for the Trial of German Major War Criminals (Nuremberg, 1946). In response to the argument that Hague Convention No. IV did not apply because of the general participation, *si omnes*, clause (several of the belligerents were not parties to the Convention), the IMT appeared to acknowledge that at the time the Regulations were adopted, the participating states believed that they were making new law: "but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war."³⁸ The IMT did not even discuss the process by which the Hague Regulations had metamorphosed from conventional into customary law. The Tribunal's language ("regarded") suggests that the Tribunal may have looked primarily at the *opinio juris*, rather than at the actual practice of states. Similarly, but somewhat more cautiously, the International Military Tribunal for the Far East (1948) viewed Hague Convention No. IV "as good evidence of the customary law of nations, to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation."³⁹ This Tribunal, in contrast to the IMT, did not regard the Hague Regulations as necessarily an exact mirror of customary law.

The most interesting case on the relationship between custom and treaty, in the context of the Geneva Conventions, is *United States v. von Leeb* ("The High Command Case").⁴⁰ Unlike the IMT judgment, which focused on the significance of the *si omnes* clause in Hague Convention No. IV 32 years after its adoption, *von Leeb* principally concerned whether and to what extent the 1929 Geneva Prisoners of War Convention, to which the Soviet Union was not a party, could be binding on Nazi Germany vis-à-vis the Soviet Union regarding actions stemming from the Nazi invasion of the USSR only 12 years after the Convention was adopted.

In *von Leeb*, the Nuremberg Tribunal endorsed the principle applied by the IMT with regard to the Hague Regulations, extrapolating from it to reach the 1929 Convention. The Tribunal noted:

³⁷ WAR OFFICE, THE LAW OF WAR ON LAND BEING PART III OF THE MANUAL OF MILITARY LAW 1, 4 (1958). The manual regards the Hague Regulations as embodying rules of customary international law. *Id.* at 4. See also Report of the Secretary-General on Respect for Human Rights in Armed Conflicts, UN Doc. A/7720, at 22 (1969).

³⁸ TRIAL OF GERMAN MAJOR WAR CRIMINALS, 1946, CMD. 6964, MISC. NO. 12, at 65.

³⁹ In re Hirota, 15 Ann. Dig. 356, 366. The Tribunal stated that "acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented by the Government having responsibility for the prisoners." *Id.*

⁴⁰ 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462 (1948) [hereinafter cited as TRIALS OF WAR CRIMINALS].

[I]t would appear that the IMT . . . followed the same lines of thought with regard to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding insofar as they were in substance an expression of international law as accepted by the civilized nations of the world, and this Tribunal adopts this viewpoint.

Most of the provisions of the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia.⁴¹

Although admitting that "certain detailed provisions pertaining to the care and treatment of prisoners of war" could be binding only as conventional law,⁴² the Tribunal cited as customary law 5 provisions of the 1907 Hague Regulations and 19 provisions of the 1929 Geneva Convention, even including a provision (Article 9) requiring that "[p]risoners captured in unhealthy regions or where the climate is injurious for persons coming from temperate regions, shall be transported, as soon as possible, to a more favourable climate." Some of the provisions of the Geneva Convention listed by the Tribunal ranged far beyond the few short principles stated in the Hague Regulations. The Tribunal did not explain the process by which those provisions of the Geneva Convention that did not echo the provisions of the Hague Regulations had been transformed in just a few years into customary law. The Tribunal also did not mention the rationale for determining which provisions were part of customary law. Baxter observed that "[a] rough-and-ready distinction may be discerned between those safeguards that are essential to the survival of the prisoner, on the one hand, and those protections that are not basic or which give depth to or implement the essential principles";⁴³ but he acknowledged that that line is not rigorously adhered to. The Tribunal did refer to the Soviet Union's practice during the war of using German POWs to construct fortifications as "evidence given to the interpretation of what constituted accepted use of prisoners of war under international law."⁴⁴

In another case, which involved the defense of superior orders and was thus unrelated to the Geneva Convention, the Tribunal noted that recog-

⁴¹ *Id.* at 534-35. The Nuremberg Tribunal cited with approval Admiral Canaris's remarkable protest against the German regulations for the treatment of Soviet prisoners of war. His protest stated that the regulations were based on a "fundamentally different viewpoint" from that underlying the principles of international law: "Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war." The admiral concluded that while the Geneva Convention was not, the principles of international law on the treatment of prisoners were binding on Germany vis-à-vis the Soviet Union. *Id.* at 533.

⁴² *Id.* at 535.

⁴³ Baxter, *supra* note 17, at 282.

⁴⁴ Von Leeb, *supra* note 40, at 534. The Tribunal concluded that because of the "uncertainty of international law . . . orders providing for . . . use [of prisoners of war in the construction of fortifications outside of] dangerous areas, were not criminal upon their face." *Id.*

dition by states of such a defense in their manuals of military law was not a competent source of international law but might have evidentiary value.⁴⁵ This position appears to have been rooted in an understandable reluctance to accept the defense of superior orders from German officers. Generally, however, because of the difficulty of ascertaining significant state practice in periods of hostilities, manuals of military law and legislation of states providing for the implementation of humanitarian law norms as internal law should be considered as among the best types of evidence of such practice and, sometimes perhaps, as a statement of *opinio juris* as well. Of course, the practice of states is also reflected in the multilateral treaty, "which constitutes an expression of their attitude toward customary international law, to be weighed together with all other consistent and inconsistent evidence of the state of customary international law."⁴⁶

IV. FUTURE DIRECTIONS

Only a few international judicial decisions discuss the customary law nature of international humanitarian law instruments. These decisions nevertheless point to certain trends in this area, including a tendency to ignore, for the most part, the availability of evidence of state practice (scant as it may have been) and to assume that noble humanitarian principles that deserve recognition as the positive law of the international community have in fact been recognized as such by states. The "ought" merges with the "is," the *lex ferenda* with the *lex lata*. The teleological desire to solidify the humanizing content of the humanitarian norms clearly affects the judicial attitudes underlying the "legislative" character of the judicial process. Given the scarcity of actual practice, it may well be that, in reality, tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law.

Although the Court in the *Nicaragua* case did not discuss the formation of customary law in the direct context of the Geneva Conventions, its method cannot but influence future consideration of customary law in various fields

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We point out that army regulations are not a competent source of international law. They are neither legislative nor judicial pronouncements. . . . [But] it is possible . . . that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions had been put into general practice. It will be observed that the determination, whether a custom or practice exists, is a question of fact.

United States v. List, 11 TRIALS OF WAR CRIMINALS, *supra* note 40, at 1230, 1237.

The U.S. field manual, *supra* note 36, at 3, states that its purpose "is to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States." I agree with Baxter that such manuals provide "telling evidence" of the practice of states. Baxter, *supra* note 17, at 283.

⁴⁶ Baxter, *supra* note 20, at 52. For other evidence of state practice, see also the U.S. field manual, *supra* note 36, at 6.

of international law, including the Geneva Conventions. Having posed all the traditional, correct questions regarding the existence of actual practice and the *opinio juris*, the Court made only perfunctory and conclusory references to the practice of states. Even though there is a wide range of reasons that impel states to adopt their positions in international forums, the Court found *opinio juris* in verbal statements of governmental representatives to international organizations, in the content of resolutions, declarations and other normative instruments adopted by such organizations, and in the consent of states to such instruments.⁴⁷ This approach by the Court, to be sure, is not without doctrinal support. A scholar as respected as Judge Baxter has argued that

[t]he actual conduct of States in their relations with other nations is only a subsidiary means whereby the rules which guide the conduct of States are ascertained. The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts.⁴⁸

⁴⁷ 1986 ICJ REP. at 98–108, paras. 187–205. The Court's approach has significant antecedents in earlier cases. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16, 31–32 (Advisory Opinion of June 21); Western Sahara, 1975 ICJ REP. 12, 30–37 (Advisory Opinion of Oct. 16).

In discussing the Court's view (in the *Nicaragua* case) that "voting for a norm-declaring resolution is an exercise in *opinio juris*," Professor Franck warns:

The effect of this enlarged concept of the lawmaking force of General Assembly resolutions may well be to caution states to vote against "aspirational" instruments if they do not intend to embrace them totally and at once, regardless of circumstance. That would be unfortunate. Aspirational resolutions have long occupied, however uncomfortably, a twilight zone between "hard" treaty law and the normative void.

Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations*, 81 AJIL 116, 119 (1987).

A tendency similar to that of the ICJ can be found also in decisions of national courts on the customary law of human rights: e.g., in the emphasis by Judge Kaufman on international and domestic normative instruments prohibiting torture, on government statements and on scholarly opinion, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1930); in the focus on normative instruments to determine the prohibition in international customary law of arbitrary detention, *Rodriguez-Fernandez v. Wilkinson*, 505 F.Supp. 787, 796–800 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (1981); and in the recognition of the principle of diplomatic immunity (in the case of Raoul Wallenberg), *Von Dardel v. Union of Soviet Socialist Republics*, 623 F.Supp. 246, 261 (D.D.C. 1985). Compare Schachter's list of types of evidence adduced to support a finding that a particular human right is a part of customary law, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 11, 334–35 (1982 V). See also Schrader, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 CAL. L. REV. 751, 762–68 (1982). On practice creating customary human rights, see also RESTATEMENT (REVISED), *supra* note 32, §701 Reporters' Note 2. See also Gerstel & Segall, *Conference Report: Human Rights in American Courts*, 1 AM. U.J. INT'L L. & POL. 157, 162 & nn.79–80 (1986). For a critique of *Filartiga* and *Rodriguez-Fernandez*, see Oliver, *Problems of Cognition and Interpretation in Applying Norms of Customary International Law of Human Rights in United States Courts*, 4 Hous. J. INT'L L. 59, 60 (1981).

⁴⁸ Baxter, *supra* note 17, at 300.

Despite perplexity over the reasoning and, at times, the conclusions of a tribunal, states and scholarly opinion in general will probably accept judicial decisions confirming the customary law character of some of the provisions of the Geneva Conventions as statements of the law. Eventually, the focus of attention will shift from the inquiry into whether certain provisions reflect customary law to the judicial decisions establishing that status.

As far as lawmaking is concerned, the starting point is, of course, the practice of states. Yet in concluding noncodifying multilateral treaties even outside the humanitarian law field, norms and values are commonly asserted that differ from the actual practice of states. When it comes to human rights or humanitarian conventions—i.e., conventions whose object is to humanize the behavior of states, groups and persons—the gap between the norms stated and actual practice tends to be especially wide.

The lawmaking process does not merely “photograph” or declare the current state of international practice. Far from it. Rather, the lawmaking process attempts to articulate and emphasize norms and values that, in the judgment of some states, deserve promotion and acceptance by all states, so as to establish a code for the better conduct of nations.⁴⁹ This applies in particular to instruments designed to humanize the behavior of states in armed conflict, which is characterized by violence and violations, by the necessity to commit acts frequently not preceded by careful deliberation, by exceptional conditions, by limited third-party access to the theater of operations, and by the parties’ conflicting factual and legal justifications for their conduct. Because of these circumstances, humanitarian conventions may have lesser prospects for actual compliance than other multilateral treaties, even though they enjoy stronger moral support. Consequently, in the violent situations dealt with by the humanitarian conventions, the gulf between the more enlightened norms and the actual practice of states may, to some extent, be expected to continue.

Far from codifying the actual behavior of states or the mores of the international community, lawmaking conferences try to adopt more protective rules of conduct,⁵⁰ stretching the consensus of the negotiating states as widely as possible. As a mixture of actual and desired practice, humanitarian instruments may thus reflect deliberate ambiguity, designed to encourage broader compliance with the stated norms and to promote the greatest possible acceptance of the norms as the general law of the international com-

⁴⁹ See generally Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AJIL 283, 317–18 (1985).

⁵⁰ The Preamble to Hague Convention No. IV, *supra* note 36, expresses this approach with rare candor:

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;

Thinking it important, with this object, to revise the general laws and customs of war . . . confining them within such limits as would contain their severity as far as possible;

. . . inspired by the desire to diminish the evils of war, as far as military requirements permit

munity. In the creation of international humanitarian law, the teleological component of *lex ferenda* is especially important, though often deliberately downplayed. The sound judgment of the "legislators" and the distance between the "is" and the "ought to be" determine whether a particular instrument will raise the expectations of the international community, will be accepted in practice as the living, binding general law of the international community, or will become marginal or even fall eventually into desuetude.

In discussing the customary law character of the Geneva Conventions, two questions merit consideration. The first pertains to the status of the Conventions at the time of their adoption as declaratory of customary law, the second to the subsequent passage into customary law of norms stated in the Conventions.

As regards the first question, a further distinction is perhaps called for. Many provisions of Conventions Nos. I, II and III are based on earlier Geneva Conventions, and thus have a claim to customary law status. Geneva Convention No. IV, in contrast, was the first Geneva Convention ever to be addressed to the protection of civilian persons. A result of the universal condemnation of the Nazis' treatment of civilians in occupied Europe during the Second World War, the Convention is rooted only in the few provisions on the treatment of civilians in combat zones and occupied territories found in Articles 23, 25, 27, 28 and 42-56 of the Hague Regulations. The ICRC *Commentary* on Convention No. IV attempts to demonstrate that the Convention repeats the bulk of the Hague Regulations relating to the protection of civilian persons.⁵¹ But in their range and depth, most of the provisions in the Convention retain only a tenuous link with the brief and fairly primitive Hague Regulations; those involving procedures and implementation have no such antecedents.

Nevertheless, because some provisions of Conventions Nos. I-III formed new conventional law, and some provisions of Convention No. IV reflected customary law (e.g., the principle of protection of the physical and mental integrity of civilians, and of sick and wounded), the difference between the former Conventions and Convention No. IV is quantitative, not qualitative. All of the Conventions contain a core of principles (e.g., the Martens clause)⁵²

⁵¹ O. Uhler & H. Coursier (eds.), *supra* note 15, at 620. Regarding the antecedents of Geneva Conventions Nos. I-II, see Dinstein, *Human Rights in Armed Conflict*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 345, 346 (T. Meron ed. 1984).

However, as regards protection of private property, the Hague Regulations provide the basic principles, while Geneva Convention No. IV states a number of supplementary rules.

⁵² See Strebel, *Martens' Clause*, [Instalment] 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 252 (R. Bernhardt ed. 1982). The Martens clause reads as follows:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

The Martens clause appears also, in modified form, in the common article on the denunciation of the Geneva Conventions (63/62/142/158); in Article 1(2) of Protocol I, *supra* note 16; in the Preamble to Protocol II, *supra* note 16; and in the Preamble to the Convention on Prohi-

that express customary law. Of course, the identification of the various provisions as customary or conventional law presents the greatest difficulties.

Discussion of the second question, the development of the law of the Geneva Conventions since their adoption in 1949, should begin by noting their unparalleled success, as manifested by their acceptance as treaties by the entire international community. Because practically all the potential participants in creating customary law have become parties, little evidence is available to demonstrate that nonparties behave in accordance with the Conventions and are thus creating concordant customary law. The "Baxter paradox" (Judge Baxter himself coined the term "paradox" in this context) is in full blossom:

[A]s the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty. . . . As the express acceptance of the treaty increases, the number of States not parties whose practice is relevant diminishes. There will be less scope for the development of international law dehors the treaty. . . .⁵³

In Baxter's opinion this fate has befallen the Geneva Conventions:

Now that an extremely large number of States have become parties to the Geneva Conventions . . . who can say what the legal obligations of combatants would be in the absence of the treaties? And if little or no customary international practice is generated by the non-parties, it becomes virtually impossible to determine whether the treaty has indeed passed into customary international law.⁵⁴

But does this suggest that the door is now closed to further creation of customary law regarding matters governed by the Geneva Conventions? In tackling this question, I should mention that Baxter's approach is rooted principally in the Judgment in the *North Sea Continental Shelf Cases*. The Court's denial that the practice of parties to a convention has evidentiary weight in the creation of customary law is striking in its brevity and categorical nature:

[O]ver half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention [on the Continental Shelf], and were therefore presumably . . . acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of

bitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, opened for signature Apr. 10, 1981, UN Doc. A/CONF.95/15 (1980), reprinted in 19 ILM 1524 (1980).

⁵³ Baxter, *supra* note 20, at 64, 73. Charney points out:

In cases where . . . widespread adherence to the agreement exists, substantial evidence of state actions taken in circumstances where the agreement is not directly applicable may be hard to obtain. As a consequence, support for new rules of customary law will have to be found in the agreement and in secondary evidence derived from writers, and perhaps in self-serving official state policy statements.

Charney, *supra* note 20, at 990.

⁵⁴ Baxter, *supra* note 20, at 96.

a rule of customary international law in favour of the equidistance principle.⁵⁵

It is far from certain that the Court intended, in this context, to refer to universally accepted conventions, especially those of a humanitarian character whose object is not so much the reciprocal exchange of rights and obligations among a limited number of states as the protection of the human rights of individuals.⁵⁶ Significantly, the Court did allude cryptically to the possibility of transforming widely accepted conventions into general law:

With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.⁵⁷

Sinclair observed that "the Court has in terms recognised the possibility that customary international law may be generated by treaty. But it has carefully qualified this recognition by establishing a series of conditions which, in the instant case, it was found had not been fulfilled."⁵⁸ Moreover, in the above statement,⁵⁹ the Court did not address the question of practice by nonparties. In a trenchant dissenting opinion, Judge Lachs pointedly referred to the practice of states that were "both parties and not parties to the Convention"⁶⁰ (in delimiting continental shelf on the basis of the equidistance rule). However, even the Court's statement "that no inference could legit-

⁵⁵ 1969 ICJ REP. at 43.

⁵⁶ See Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75), Advisory Opinion No. OC-2/82 of Sept. 24, 1982, Inter-American Court of Human Rights, ser. A: Judgments and Opinions, No. 2 (1982); Ireland v. United Kingdom, 25 Publications of the Eur. Ct. Human Rights, ser. A: Judgments and Decisions, para. 239 (1978); Reservations to the Convention on Genocide, 1959 ICJ REP. 15, 23 (Advisory Opinion of May 28); T. MERON, *supra* note 7, at 146-47.

⁵⁷ 1969 ICJ REP. at 42. More recently, the Court stated that

[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them. . . . [I]t cannot be denied that the 1982 Convention [United Nations Convention on the Law of the Sea] is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law.

Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ REP. 13, 29-30 (Judgment of June 3). The Court's verbal protestation of the importance of practice and *opinio juris* for the establishment of customary law is not necessarily followed by the Court's truly seeking to identify the relevant practice. Charney thus observes that the Court fails to identify "the actual evidence of state practice upon which [it] purport[s] to rely." Charney, *supra* note 20, at 995. On the ICJ's diminishing investigation of the existence of practice and *opinio juris* in the formation of customary law, see Haggénmacher, *La Doctrine des deux éléments du droit coutumier dans la pratique de la Cour Internationale*, 90 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5, 111-14 (1986).

⁵⁸ I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 23 (2d ed. 1984) (referring, primarily, to the statement by the Court to be found in 1969 ICJ REP. at 41).

⁵⁹ See *supra* text accompanying note 57.

⁶⁰ 1969 ICJ REP. at 228 (Lachs, J., dissenting).

imately be drawn" from the action of states parties to a convention does not necessarily suggest a priori that such action can *never* be taken into account for the formation of customary international law. Acts concordant with the treaty obviously are indistinguishable from acts "in the application of the Convention." But if it could be demonstrated that in acting in a particular way parties to a convention believed and recognized that their duty to conform to a particular norm was required not only by their contractual obligations but by customary or general international law as well (or, in the case of the Geneva Conventions, by binding and compelling principles of humanity), such an *opinio juris* might and should be given probative weight for the formation of customary law.

Opinio juris is thus critical for the transformation of treaties into general law.⁶¹ To be sure, it is difficult to demonstrate such *opinio juris*,⁶² but this poses a question of proof rather than of principle. The possibility that a party to the Geneva Conventions may be motivated by the belief that a particular course of conduct is required not only contractually but by the underlying principles of humanity is not farfetched.

In any event, the "real issue," as Sinclair stated in his discussion of D'Amato, appears

to be whether treaties, considered as elements of State practice . . . need to be accompanied by *opinio juris* in the traditional sense in order to be regarded as being expressive of or as generating rules of customary international law; and, if so, how this requirement of *opinio juris* can be satisfied.⁶³

How does one assess the weight of such *opinio juris*, which is not accompanied by practice of nonparties, vis-à-vis nonparties? In the absence of practice extrinsic to the treaty, nonparties are unlikely to accept being bound by what the parties may consider to be custom grafted onto the treaty. The question may thus turn on the proof of acquiescence by nonparties in the norm stated in the treaty.⁶⁴ For the Geneva Conventions, however, to which all the potential actors are already parties, this question is academic.

In the *Nicaragua* case, the Court held that the Charter does not subsume

⁶¹ 1969 ICJ REP. at 41.

⁶² Professor D'Amato alludes to this difficulty in *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1141 (1982).

The distinction between an *opinio juris generalis* and an *opinio obligationis conventionalis* has already been made by Professor Cheng. Cheng, *Custom: The Future of General State Practice in a Divided World*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 513, 532-33 (R. Macdonald & D. Johnston eds. 1983). In a different context (concerning the adoption of a treaty at an international conference), Professor Sohn speaks of *opinio juris* in the sense that the provisions of a convention "are generally acceptable." Sohn, "Generally Accepted" *International Rules*, *supra* note 20, at 1078. He considers a multilateral convention "not only as a treaty among the parties to it, but as a record of the consensus of experts as to what the law is or should be." Sohn, *Unratified Treaties as a Source of Customary International Law*, *supra* note 20, at 239.

⁶³ I. SINCLAIR, *supra* note 58, at 256.

⁶⁴ See Baxter, *supra* note 20, at 73. See also Sohn, "Generally Accepted" *International Rules*, *supra* note 20, at 1074-75.

or supervene customary international law and that "customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content."⁶⁵ In contrast to the brevity and the high level of abstraction of the principles of the Charter, the provisions of the Geneva Conventions are characterized by their extensive detail. It is therefore even more difficult for a significant layer of customary law to be created alongside the Conventions, especially when they are applied only in rare and exceptional situations.⁶⁶

Nevertheless, this possibility should not be discounted altogether, especially with regard to practice not adequately or explicitly regulated by the Conventions, e.g., in situations of prolonged belligerent occupation (where Geneva Convention No. IV leaves some questions unanswered) or internal strife falling short of noninternational armed conflict.⁶⁷ Such development of customary law in the interstices of a treaty, however, does not suggest that the treaty itself would necessarily become customary law.

A practice of states that modifies the original provisions of the Conventions may also spawn new rules of customary law. But it may prove difficult to distinguish such rules from additional layers of treaty law created by the parties through interpretation or modification as a result of practice.⁶⁸

In addition, the emergence of customary law in other fields of international law may have an impact on the transformation of the parallel norms of the Geneva Conventions (those with an identical content) into customary norms. Consider, for instance, the developments in the human rights field that led to the recognition of the prohibitions of the arbitrary taking of life and of torture as norms of customary law.⁶⁹ The recognition as customary of norms rooted in international human rights instruments will probably affect through a sort of osmosis the interpretation, and eventually perhaps even the status, of the parallel norms in instruments of international humanitarian law, including the Geneva Conventions. Finally, as suggested by our comments on the *North Sea Continental Shelf Cases*, observance of the provisions of the Conventions, especially if accompanied by verbal affirmations supporting the binding, even *erga omnes*, character of the humanitarian principles stated in the Conventions, may constitute *opinio juris* facilitating the gradual metamorphosis of those conventional norms into customary law.

Perhaps because of the strong moral claim for the application and observance of the norms in instruments relating to international human rights and humanitarian law⁷⁰ (to which these comments are confined), and because

⁶⁵ 1986 ICJ REP. at 96, para. 179. See also *id.* at 93-95, paras. 174-77.

⁶⁶ Dinstein argues that because Geneva Convention No. IV had not been applied between its adoption in 1949 and the Six-Day War (1967), there was no practice that could have been relied upon for the transformation of the Convention's norms into customary law. Dinstein, *supra* note 4, at 167-68.

⁶⁷ See T. MERON, *supra* note 10, at 135-39; Meron, *Inadequate Reach*, *supra* note 10; Meron, *Towards a Humanitarian Declaration on Internal Strife*, 78 AJIL 859 (1984).

⁶⁸ See Vienna Convention on the Law of Treaties, *supra* note 21, Arts. 31 and 41. See also I. SINCLAIR, *supra* note 58, at 138.

⁶⁹ See, e.g., RESTATEMENT (REVISED), *supra* note 32, §702. Compare Schachter, *supra* note 47, at 97-98.

⁷⁰ See Baxter, *supra* note 17.

of the different kinds of evidence of state practice involved,⁷¹ both scholarly and judicial sources have shown reluctance to reject as candidates for customary law status, because of contrary practice, conventional norms whose content merits such status. A crucial distinction can be made between episodic breaches of a rule and such massive and grave violations as to amount to "State practice" that nullifies the legal force of [a] right."⁷² Professor Schachter proposes as a yardstick the "intensity and depth of the attitudes of condemnation"⁷³ by third parties. This criterion has the advantage of turning on the reactions of others to a particular breach rather than on the self-serving statements of the actor state itself. It is thus preferable to the following criteria enunciated by the Court in the *Nicaragua* case:

If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.⁷⁴

Elsewhere, the Court elaborated by stating that "[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law."⁷⁵ Despite the helpful reference in the latter statement to third-party responses to a particular state's claim, there is some danger that the Court's standard as formulated in the earlier statement⁷⁶ may be misunderstood or even misused. After all, it is common practice for states bent on evading compliance with international law to resort to factual or legal exceptions or justifications contained in the rule itself and in the relationship of their particular case or situation to that rule. Obviously, states normally shield themselves with self-serving justifications, calculated to minimize international censure of their course of action. In some situations, which are infrequent, a state may want to challenge frontally the existence of a rule of law, but as Professor Charney observes, "States will rarely, if ever, admit that they have violated customary international law, even in order to change it. Rather, they will argue that their behavior is consistent with the traditional law, or that the law has already changed."⁷⁷ Why should they challenge the rule frontally, if less provocative conduct would serve them better?⁷⁸

⁷¹ See Schachter, *supra* note 47, at 334-35. Schachter observes that "value-judgments are always implicit in the recognition of practice as law." *Id.* at 96.

⁷² *Id.* at 336.

See the exchange between Watson and Sohn on the significance of the discrepancy between human rights and the reality of state practice, Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L.F. 609, 626-35; Sohn, *The International Law of Human Rights: A Reply to Recent Criticisms*, 9 HOFSTRA L. REV. 347, 350-51 (1981).

⁷³ Schachter, *supra* note 47, at 336.

⁷⁴ 1986 ICJ REP. at 98, para. 186.

⁷⁵ *Id.* at 109, para. 207.

⁷⁶ See *supra* text accompanying note 74.

⁷⁷ Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AJIL 913, 916 (1986).

⁷⁸ With some exceptions, e.g., Iran's claim that Iraqi POWs should be treated according to the dictates of the Koran, which claim implies the subordination to the Koran of Geneva Con-

If states fail to observe the provisions of the Geneva Conventions in conflicts in which they are involved or resort to numerous reservations⁷⁹ having a significant adverse impact on the actual observance of the norms in the Conventions, the claims of the Conventions to customary law status will naturally be weakened. Taken cumulatively, frequent evasions by states of those norms by reliance on the specific circumstances of particular situations (*sui generis* claims) can only erode the position of the Conventions as crucial instruments of humanitarian law and as claimants to customary and a fortiori to *jus cogens* status.

The decisive factor is whether states observe the Geneva Conventions or not. As with other widely ratified treaties, if states parties comply with the Geneva Conventions in actual practice, verbally affirm their vital normative value, and accept them in *opinio juris*, states and tribunals will be reluctant to make and to accept the argument that the law of Geneva is solely, or even primarily, conventional. Such observance by the parties will eventually lead, in the perception of governments and public opinion, to the blurring of the distinction between norms of the Conventions that are already recognized as customary law and other humanitarian provisions of the Conventions that have not yet achieved that status. In the last analysis, movement in this direction depends on whether states realize that, in the long run, bona fide compliance with the Geneva Conventions serves their best interests.

vention No. III (see UN Doc. S/16962, at 38, 42 (1985)), states tend to avoid a frontal challenge to the Conventions, preferring instead to justify their discordant practices on differences between the conflicts presently encountered and those for which these instruments were originally adopted. Aldrich, *Human Rights and Armed Conflict: Conflicting Views*, 67 ASIL PROC. 141, 142 (1973); Roberts, *supra* note 4, at 279-83.

The recent resolution on Respect for International Humanitarian Law in Armed Conflicts and Action by the ICRC for Persons Protected by the Geneva Conventions highlighted violations of the Geneva Conventions and "a disturbing decline in the respect of international humanitarian law" and acknowledged that "disputes about the legal classification of conflicts too often hinder the implementation of international humanitarian law." 25th International Conference of the Red Cross, Doc. P.1/CI, Ann. 1 (1986).

Professor Henkin has cogently observed that to reduce the "cost" of violating the law, states will often highlight ambiguities about the facts and their proper characterization, as well as uncertainties about the applicable norm. See L. HENKIN, *HOW NATIONS BEHAVE* 70 (1968).

⁷⁹ I am addressing here the question of the number and the extent of the reservations actually made rather than the question whether a particular reservation is compatible with the purpose and object of the Convention or is prohibited. See generally Baxter, *supra* note 17, at 285; Baxter, *supra* note 20, at 48-52.

AGORA: MAY THE PRESIDENT VIOLATE CUSTOMARY INTERNATIONAL LAW? (CONT'D)

FEDERAL STATUTES, EXECUTIVE ORDERS AND "SELF-EXECUTING CUSTOM"

A hotly debated issue raised in this publication's October 1986 *Agora*¹ and, repeatedly, during the drafting of the *Restatement of Foreign Relations Law of the United States (Revised)* has to do with the relationship between customary international law and federal law in the United States. Most of the debate addressed whether a newly emerged custom would supersede an earlier federal statute or self-executing treaty. The reporters of the *Restatement* took a strong stand at first, placing custom on the same plane as federal statutes and self-executing treaties: in case of conflict, the latest in time should prevail.² Criticism rolled in, and the reporters eventually retreated a bit. The final version says only that since custom and international agreements have equal authority in international law, and both are law of the United States, "arguably later customary law should be given effect as law of the United States, even in the face of an earlier law or agreement, just as a later international agreement of the United States is given effect in the face of an earlier law or agreement."³

A related question is whether custom could ever supersede a federal executive act, as a matter of U.S. law. Put conversely, the question is whether a federal executive act would prevail over a contrary customary rule. A recent case, *Garcia-Mir v. Meese*,⁴ has redirected the debate toward this question. Professor Henkin appears to have the best of the debate so far, but his position still needs some modification. To that end, one must focus on the President's "sole" powers and on what could be called "self-executing custom."

Garcia-Mir dealt with an executive act as well as a congressional enactment. Cuban refugees were being detained in the Atlanta Penitentiary, as excludable aliens. One group had committed crimes in Cuba before joining the "freedom flotilla" to the United States, and consequently was never paroled into this country. A second group had been paroled into the United States, but parole was subsequently revoked. In the trial court, both groups obtained

¹ See *Agora: May the President Violate Customary International Law?*, 80 AJIL 913 (1986) (pieces by Professors Charney, Glennon and Henkin); see also Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U.L. REV. 322 (1985) [hereinafter cited as Glennon, *Raising The Paquete Habana*].

² RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) [hereinafter cited as RESTATEMENT (REVISED)] §135 comment *b* and Reporters' Note 1 (Tent. Draft No. 1, 1980).

³ *Id.* §135 Reporters' Note 4 (Tent. Draft No. 6, 1985).

⁴ 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S.Ct. 289 (1986).

an order directing the U.S. Government to provide a separate parole revocation hearing for each refugee. On appeal, one issue was whether customary international law prohibiting prolonged arbitrary detention⁵ required that the refugees be given individual hearings or released.

The court quoted well-known language from *The Paquete Habana*: "Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."⁶ Taking this to mean that any executive or legislative act would prevail over custom—apparently without regard to whichever is later in time—the court found that a 1980 legislative act precluded the application of customary international law to the first group and an executive act (by the Attorney General) precluded its application to the second group.

It is questionable whether there was indeed a preclusive legislative act as to the first group.⁷ I do not propose to address that issue. If the court was correct as to Congress's intent, the later-in-time rule would be on the side of the congressional enactment. However, if the custom was later in time, there is a question not recognized by the revised *Restatement* that should be answered before the custom could "arguably" prevail.

To examine the question, it is necessary to begin with an elementary point about treaties. Only self-executing treaties have the effect of federal (domestic) law in the United States. Not all treaties are self-executing. The same principle clearly should apply to customary international law. Although it is not common parlance to speak of "self-executing custom," it is apparent that certain rules of custom are, in effect, self-executing and others are not. The most obvious and most important of the potentially self-executing rules are many of those protecting basic human rights. They benefit individuals directly, and they are specific enough to be enforced judicially.

At the non-self-executing end of the spectrum would be most norms dealing with highly political types of intergovernmental conduct. Professor Henkin has given some examples (overflying foreign territory without consent, bringing down a foreign aircraft, violating a diplomat's immunity), but he has not dubbed them "non-self-executing."⁸ In fact, he has said elsewhere, quite flatly, that customary international law is "self-executing."⁹ His own examples show that such a flat statement cannot be justified.

The rule against prolonged arbitrary detention would be a "self-executing

⁵ See, e.g., RESTATEMENT (REVISED), *supra* note 2, §702 (Tent. Draft No. 6, vol. 1, 1985); Universal Declaration of Human Rights, Dec. 10, 1948, GA Res. 217A, UN Doc. A/810, at 71 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 9(1), GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); *Fernandez v. Wilkinson*, 505 F.Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981). See also Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 402-04 (1985).

⁶ 175 U.S. 677, 700 (1900).

⁷ See *Garcia-Mir v. Meese*, 788 F.2d at 1454 n.9.

⁸ Henkin, *The President and International Law*, in *Agora*, *supra* note 1, at 930, 935.

⁹ Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561, 1566 (1984).

custom," though not at the level of a peremptory norm.¹⁰ Thus, if any nonperemptory rule of custom could supersede an earlier federal statute, this one could. As a self-executing norm, it could stand on its own entirely apart from whatever auxiliary role it might play as an aid in interpreting constitutional rights and liberties.

With due respect, however, to the view of the reporters of the revised *Restatement*, it is extremely doubtful whether any customary rule, qua custom, could prevail over a validly enacted earlier federal statute.¹¹ Custom exists as an independent source of U.S. law only as federal common law.¹² At least in fields other than foreign relations, common law—including federal common law—yields to enacted statutory law. Usually, that comes up in the context of a statute later in time than the common law rule, but in a democratic society that has placed rule-making power in the hands of elected representatives, the principle is the same whether the enacted law is earlier or later in time than the nonconstitutional common law rule. Thus, in *Garcia-Mir*, even if the custom were later in time, it should not prevail as a nonconstitutional common law rule in the case of the first group of refugees—provided, of course, that Congress actually intended to authorize indefinite detention.

The result should be different, however, for the second group of refugees. It certainly does not follow from what has been said above that any otherwise-valid federal executive act would prevail over an earlier or later customary rule. In *Garcia-Mir*, the parties and the court focused on the question whether an executive act would have to emanate from the President, himself, to override contrary custom. The court thought not, and held that a decision by the Attorney General (to incarcerate the refugees indefinitely, pending deportation) would suffice.¹³ This holding does not fully address the issue.

Even if the President had personally ordered the indefinite detention of the second group of refugees, the contrary rule of customary international

¹⁰ See Lillich, *supra* note 5, at 404 n.177.

¹¹ A possible exception would be a customary rule in whose development the President, or his high-ranking delegate, had actively participated as commander-in-chief of the armed forces or as the chief U.S. diplomat. He does seem to have domestic lawmaking power under these constitutional grants of authority, narrowly applied. See the discussion in the text at notes 14–17.

¹² See Glennon, *Can the President Do No Wrong?*, in *Agora*, *supra* note 1, at 923; Glennon, *Raising The Paquete Habana*, *supra* note 1, at 343–47. Cf. RESTATEMENT (REVISED) §131 comment d (Tent. Draft No. 6, vol. 1, 1985). Professor Henkin has argued that custom is only like common law in that it is unwritten. See Henkin, *supra* note 8, at 933; Henkin, *supra* note 9, at 1561–62. But no court has ever found unwritten federal law to be anything other than federal common law.

Custom may also inform constitutional provisions, particularly in the Bill of Rights. In that context, custom is an aid to constitutional interpretation, not an independent source of law. As such, it could properly be said to be of a higher order than nonconstitutional federal law, whether statutory or common law. The court in *Garcia-Mir* treated the unadmitted aliens as not eligible for protection by "the core values of the Due Process Clause *per se*." 788 F.2d at 1447. That may be questionable, but I do not propose here to challenge it.

¹³ To the contrary, see Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, in *Agora*, *supra* note 1, at 913, 919–22.

law should prevail in a U.S. court.¹⁴ The President has broad cons power to conduct foreign affairs, but his power is not unlimited. In p his independent power to take action that has domestic lawmaki must necessarily be subject to some constraints emanating from th I, section 1 grant of all legislative powers to Congress. That gra preclude the President from exercising independent legislative po cept to the extent that domestic legislative effect is a necessary con of an Article II power granted to the President alone.

There are three Article II grants that might qualify. They are of authority as commander-in-chief of the armed forces; the aut receive ambassadors and other public ministers (i.e., to be the chief d and the authority to execute faithfully the laws of the United Stat latter grant, though sometimes regarded as a source of independ dential authority, obviously is not. To treat it as a source of ind authority would simply be to grant undefined and undefinable p the presidency. Neither the intent of the Framers nor the practi last 200 years supports any such untamed presidential authority.

Much more convincing is the argument that, in the absence of zation from an act of Congress, the President's domestic lawmaki emanates only from his constitutional authority as commander-in- as chief diplomat. This would give him such legislative power as is i for the effective use of the armed forces against opposing armed i least in the event of a congressionally declared war or a true nec immediate self-defense), as well as lawmaking authority in the co the recognition of foreign governments,¹⁶ the diplomatic represer American nationals in their dealings with foreign governments, a essentially diplomatic functions. These are rather narrow power they should be in a constitutional system that allocates "all legislative to Congress.¹⁷

In *Garcia-Mir*, this means that the refugee-detention decision c ecutive branch should not have prevailed over a contrary "self-ex rule of customary international law. This would be true whether th crystallized before or after the executive branch's decision, and wh decision was made by the President himself or by someone else i ecutive branch. The decision to detain refugees simply was not th decision entrusted to a commander-in-chief of the armed force diplomat carrying out normal diplomatic functions. It was made b torney General, essentially to maintain law and order. It is immat

¹⁴ But see Charney, *supra* note 13.

¹⁵ Cf. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 39-44 (1972).

¹⁶ See *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 31 (1942).

¹⁷ Professor Henkin gives the President too much latitude when he contemplates i presidential power stemming from a role defined as the "sole organ" in foreign aff as from the commander-in-chief role. See Henkin, *supra* note 8, at 934, 936. He organ" as chief diplomat, but that is a narrower category than Professor Henkin see in mind.

the Attorney General's authority to deal with refugees stems from a foreign relations statute, the Immigration and Nationality Act.¹⁸ There is no indication of congressional intent in that Act to authorize a step that would violate international law.

If a decision of the executive branch is not made by the President himself, or by authority the President has clearly delegated to a high-ranking civilian Defense Department official (in the case of the commander-in-chief power) or to a high-ranking State Department official (in the case of diplomacy), the presumption should be that it is not within the powers of the commander-in-chief or of the chief diplomat. If the presumption is not convincingly rebutted, "self-executing custom" should prevail as a matter of federal common law. Even if the executive branch's act is by the President or his high-ranking civilian delegate, "self-executing custom" should prevail unless the act squarely comes within one of the two relevant Article II powers.¹⁹

FREDERIC L. KIRGIS, JR.*

THE PRESIDENT AND INTERNATIONAL LAW: A MISSING DIMENSION

As the chairman of the panel at the 1985 ASIL Annual Meeting on the question "May the President Violate Customary International Law?" I must confess that the issue that originally troubled me when I suggested this topic for discussion remains securely hidden in the shadows of the debate. Yet I think it is of central importance. The reason it has remained obscure, despite its significance, is that it is an extraordinarily difficult intellectual puzzle. My brief purpose here is to bring it into the light, not to try to solve it.

We can begin by noting an organizing principle that appears to have been accepted either explicitly or implicitly by all of the persons who have contributed so far to the debate. The organizing principle is that there are two distinct questions involved here: (1) May the President, under the law of the United States, violate international law? and (2) May the United States, under international law, violate international law? The second question has been posed somewhat differently in the debate, such as: May Congress violate international law? or May the President, with explicit congressional approval, violate international law? But these are just variants on the question.

As I have put the second question, the answer would seem to be logically compelled. How could international law be legally violated by any country?

¹⁸ 8 U.S.C. §§1101 *et seq.* (1982).

¹⁹ This is a narrower point than some commentators have made. In an interesting article containing much historical analysis, Professor Lobel argues that explicit congressional approval is necessary for the President to override customary international law. See Lobel, *The Limits of Constitutional Power: Conflicts between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1120 (1985). See also Glennon, in *Agora*, *supra* note 1, at 924, 930; Glennon, *Raising The Paquete Habana*, *supra* note 1, at 331-39, 363.

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Surely, with reference to the international legal system, the United States may not violate international law.

But now the second question, as it has apparently been answered, seems to dictate the result of the first question—at least, if one takes literally the *Paquete Habana*¹ formulation that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”² For the same international law that on the international level forbids the United States (or any country) from violating it would, when translated into U.S. law, likewise forbid the Government of the United States from violating it. Or, if that position seems too strong, one might argue more modestly that international law, when it becomes part of U.S. law, at least forbids the Executive, acting alone, from violating it. Whether one takes the stronger or weaker position, one is simply involved in U.S. constitutional law. The international question has melted away.

But let us go back to the dark shadows. Is it really true that international law forbids nations from violating it? This question, which seems on its face to compel its own answer, in fact is not as clear as it appears. To be sure, it is perfectly clear with respect to *treaties*, and maybe a word about that would help set the stage. A treaty is a legal obligation that, under international law, simply cannot legally be violated. There are apparent exceptions to this rule, but they are only apparent. For example, if state *A* violates the treaty, then state *B* may act contrary to the terms of the treaty. Yet, importantly, we do not say that *B* has acted illegally; *B*'s actions do not violate the treaty because the treaty has already lost its legal bindingness on *B* because of the illegal act of *A*. Or take the example of a change of circumstances. In such a case, a party to a treaty may legally act contrary to the treaty. Again, it has not violated the treaty (although it has acted contrary to the treaty provisions) because we say that the treaty itself has changed in content as a result of the changed circumstances.

Where the answer is not clear is in the realm of *customary* international law. I invented the question that started off this debate by explicitly referring to custom; yet the debaters so far have made little use of the distinction between treaties and custom with respect to their positions regarding presidential power. It comes to this: Can customary law be said to tolerate a state's disobeying customary law, and if so, in what circumstances?

Consider how customary international law has evolved and changed through the centuries. Lacking a real legislature, the system appears to have tolerated changes in customary law as the result of *departures* from preexisting norms. Are these departures not also “violations”?

The process is a lot closer to Hegelian dialectic than to Aristotelian logic. Existing common law sets up a thesis; a state, acting in violation of it, manifests an antithesis. A new synthesis occurs; it can range from near congruity to the original thesis or to the antithesis or to a position at any point in between.

¹ 175 U.S. 677 (1900).

² *Id.* at 700.

The synthesis then becomes a new thesis, awaiting contradiction by a state acting antithetically to it.

Existing customary law, then, contains the seeds of its own violation; otherwise it could never change itself. Since it has changed over time, we know that a systemic dialectic process of change must be part of what we mean by the term "customary international law."

Now, if we ship that concept of customary international law aboard the *Paquete Habana*, we find that what disembarks in the United States is not the monolithic, unchanging norm that the participants in the present debate seem to have in mind, but rather a somewhat more fluid kind of law, one that tolerates, even if it does not technically permit, violations of itself, because it must. The possibility opens up, at least logically, that the United States could "disobey" this law, but that its doing so would not necessarily be a violation of the Executive's constitutional obligation to execute the law.

I have tried to couch these conclusions in terms such as "logically" and "necessarily," because there is a great danger here of being misunderstood. Hegelian logic is only a schematic diagram of a mental possibility; it contains no details. To apply it to customary international law tells us nothing about the content of the law itself; yet, in law, content is everything. Different rules of customary law, accordingly, differ according to their Hegelian force. Some may easily be overcome by antitheses; others may be more resilient. A newly emerging customary rule, such as the exact distance in nautical miles allowable for the proclamation of an exclusive economic zone, may be quite a weak thesis awaiting forceful distortion by maritime powers exercising their own normative antitheses. On the other hand, a thesis that a nation is entitled to a territorial sea of at least 3 nautical miles seems enormously powerful, having survived any threats of contradiction for centuries and currently enjoying a large margin of safety in the general acceptance of a customary rule allocating at least 12 miles for the territorial sea.

Depending on these different degrees of force, presidential "contradictions" may have different degrees of legality. In brief, we might not be able to answer the question whether the President may violate customary law in general. That may turn out to be a metaphysical question. The only questions we might be able to address are whether the President may violate this or that particular rule of customary law. And those questions, in turn, merge the jurisprudential character of the present debate with the expertise in ascertaining rules of customary law that only comes from extensive study of international law.

ANTHONY D'AMATO*

THE PRESIDENT IS BOUND BY INTERNATIONAL LAW

In a recent issue of the *Journal*, one finds a largely theoretical discussion of a question that potentially implicates quite serious legal policies and con-

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sequences: "May the President violate customary international law?"¹ Despite professorial conjecture, the answer to such a question, which can be documented in actual trends in legal decision, emphatically has been no (i.e., the President is bound by and may not lawfully violate international law).

While a few academics (few indeed) and aspiring lawbreakers within the executive branch have had the audacity publicly to disagree, it is evident to a thorough reader that they either were unfamiliar with relevant language from several judicial opinions and opinions of the attorneys general or had misinterpreted some of that language. In view of the actual trends in legal decision and the legal policies at stake, there is simply no viable counterargument. The President must obey and faithfully execute supreme federal law whether it is customary or treaty-based.

The Constitution, as a document, nearly expressly supports such an answer. It documents an early expectation that international law is part of the supreme federal law to be applied at least by the Executive and the judiciary.² It also documents broader legal policies at stake, all of which make it quite evident that if the President violates constitutionally based international law, he violates not only his constitutional oath and duty, but also the expectations of the Framers—still generally shared—about authority, delegated powers and democratic government.³ "When the President violates the law, he acts without authority, beyond his constitutionally prescribed powers, and, quite likely, in a way destructive of democratic values. As the House Judiciary Committee found [not long ago], such violations are 'subversive of constitutional government.'"⁴ Predominant trends in judicial decision clearly affirm these points.⁵

Perhaps the earliest judicial recognition of the fact that the Executive is bound by international law is that of Justice Iredell in *Ware v. Hylton*,⁶ in which the Justice affirmed in a clear and trenchant manner: a treaty is obligatory "on all, as well on the Legislative, Executive, and Judicial Departments . . . as on every individual of the nation."⁷ Later, following a lower federal

¹ See *Agora*, 80 AJIL 913 (1986).

² See, e.g., U.S. CONST. art. II, §1, cl. 8, and §3; art. III, §2; art. VI, cl. 2; amend. IX; Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HASTINGS CONST. L.Q. 719, 719, 740–58 (1982), and references cited [hereinafter cited as Paust, *President Bound*]; Human Rights and the Ninth Amendment: A New Form of Guarantee, 60 CORNELL L. REV. 231 (1975); *Rediscovering the Relationship Between Congressional Power and International Law: The Exceptions to the Last in Time Rule Concerning Clashes Between Treaties, Custom and Federal Statutes (with a Restatement of the Draft Restatement)* (forthcoming) [hereinafter cited as Paust, *Rediscovering the Relationship*].

³ See, e.g., Paust, *President Bound*, *supra* note 2, at 740, 746–49, *passim*; see also J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 193 (3d ed. 1986).

⁴ Paust, *President Bound*, *supra* note 2, at 748–49.

⁵ See, e.g., *id.* at 724–25, 727, 750–58; Paust, *Rediscovering the Relationship*, *supra* note 2; notes 6–32 *infra*.

⁶ 3 U.S. (3 Dall.) 199 (1796).

⁷ *Id.* at 272 (Iredell, J.); see also *id.* at 260–61 ("Congress . . . alone ha[s] such authority" to "vacate" a treaty for breach). That same year President Washington, in a message to the House of Representatives, affirmed that "every Treaty [properly ratified] . . . thenceforward becomes the law of the land . . . , and . . . all the treaties made . . . , when ratified, . . . become obligatory," the treaty with Great Britain also exhibiting "in itself all the objects requiring

court decision in 1799, Representative Marshall (the year before he became Chief Justice) also recognized that the President is bound to execute a treaty because it is supreme federal law;⁸ and in 1800, Justice Chase, while sitting on circuit, added:

If the president, . . . by this treaty, was bound to give this Nash up to justice, he was so bound by the law; for the treaty is the law of the land . . . His delivery was the necessary act of the president, which he was by the treaty and the law of the land, bound to perform; . . . [the] president . . . [has a] duty . . . [of] carrying a solemn treaty into effect.⁹

In 1801, Chief Justice Marshall recognized that if the President were to condemn a vessel in violation of a treaty, which is supreme law of the land, it "would be a direct infraction of that law, and, of consequence, improper";¹⁰ and in 1804, he affirmed that if the President were to order a violation of international law to occur, such an executive order would not be an excuse or defense for lower officials.¹¹ By 1806, Justice Paterson, sitting on circuit, had affirmed similarly: "the law is paramount," and the President, in exercising the war power, cannot "authorize a person to do what the law [either domestic or international] forbids."¹² And in 1813, Justice Story, sitting on circuit, addressed a claim that the President might be able to violate the law of nations, stating: although it was "argued, on behalf of the United States, in some of the causes before the court, that the authority of the president" delegated by Congress included "a power to abridge the general rights of capture" under the law of nations, "I cannot yield to this construction."¹³ The constitutional duty of the President, law and authority,

legislative provision." Message of Mar. 30, 1796, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 371 (M. Farrand ed. 1937).

Importantly also, it was recognized in Secretary Jay's 1786 report to Congress during the Confederation that a treaty of the United States immediately bound "the whole nation, and superadded to the laws of the land," and was to be "received and observed by every member of the nation." Report of Secretary of Foreign Affairs John Jay, Oct. 13, 1786, extract reprinted in 1 C. BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES 268, 270 n.4 (1902). Jay's report was unanimously adopted by Congress. See C. BUTLER, *supra*, at 389. Given this pattern of expectation, it would have been improper even to suggest during the drafting of the Constitution that the President should have some new immunity from international law unlike any person or entity previously involved in the ratification of treaties or the shaping of custom. Indeed, such an incredible notion would have been both anticonstitutional and subversive of the law.

⁸ See *United States v. Robins*, 27 F.Cas. 825, 836, 867 (D. S. C. 1799) (No. 16,175), note (Rep. Marshall, 10 ANNALS OF CONG. 614 (1800)); see also 27 F.Cas. at 832-33 (Judge Bee) (treaty is supreme federal law and judges are bound thereby).

⁹ *United States v. Cooper*, 25 F.Cas. 631, 641-42 (C.C.D. Pa. 1800) (No. 14,865) (Chase, J., on circuit).

¹⁰ *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J., opinion).

¹¹ See *The Flying Fish*, 6 U.S. (2 Cranch) 170, 179 (1804) (Marshall, C.J., opinion).

¹² *United States v. Smith*, 27 F.Cas. 1192, 1229-30 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J., on circuit).

¹³ *The Joseph*, 13 F.Cas. 1126, 1130-31 (C.C.D. Mass. 1813) (No. 7,533) (Story, J., on circuit), *aff'd*, 12 U.S. (8 Cranch) 451 (1814) (the same year as *Brown*; see note 14 *infra*).

as well as prior judicial precedent, had been saved. Indeed, precedent relative to an adequate reading of *Brown v. United States* (decided in 1814)¹⁴ had been set.

Brown, the reader may recall, is one of the cases referred to in *The Paquete Habana*¹⁵ (two of the very few judicial opinions addressed by writers on this question in the *Journal*). Professor Charney has argued that *Brown* provides "the clearest case" in which the President recognizably has discretion to engage in a "violation of international law" because Chief Justice Marshall stated that mere "'usage is a guide which the sovereign follows or abandons at his will.'" ¹⁶ As noted in other writings, however, mere usage is certainly not the equivalent of international law but is merely a long-term practice, which, of course, is not per se binding on the United States.¹⁷ As the quoted language actually recognizes, it is merely "a guide which the sovereign" can follow or abandon. Further, in *Brown*, it was also recognized that mere "usage . . . is not an immutable rule of law," but "is a question rather of policy than of law."¹⁸ Indeed, as documented in other writings, the various opinions of the Justices in *Brown* and the holding actually affirm that the President is bound by international law.¹⁹ Moreover, no other reading of Chief Justice Marshall's opinion in *Brown* could be consistent even with the prior recognitions of the Chief Justice noted above, much less the thrust of relevant judicial decision making up to 1814. *Brown* also recognized that the President is not the "sovereign" in the United States and that the legislature was delegated such a sovereign power—it is a power "not of the executive or judiciary"²⁰—an important point in this sort of debate that seems conveniently to have been forgotten.

¹⁴ 12 U.S. (8 Cranch) 110 (1814). By the time *Brown* was decided, the phrase "law of nations" had also been used interchangeably with the phrase "international law" to cover both customary and treaty-based law and to relate to private rights, duties, remedies and sanctions, as well as those concerning nation-states and official elites. See, e.g., Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts* (forthcoming); see also *Litigating Human Rights: A Commentary on the Comments*, 4 Hous. J. INT'L L. 81, 84–88, 90–91, 94, 99 & n.123 (1981).

¹⁵ See 175 U.S. 677, 711 (1900).

¹⁶ See Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AJIL 913, 921–22 n.27 (1986). This error one might term the "usage" error.

¹⁷ See, e.g., Paust, *President Bound*, *supra* note 2, at 735–36 & n.57; Paust, *Rediscovering the Relationship*, *supra* note 2 (also citing several other cases).

¹⁸ See 12 U.S. (8 Cranch) at 128. The question of "policy" becomes whether one should follow long-term practice in a given case. The claim addressed was actually one that the President should be able to seize property that, by international law, was subject to seizure, not that a President could violate such law. See *id.*

¹⁹ See, e.g., Paust, *President Bound*, *supra* note 2, at 727 & n.24, 736, 754 & n.142, 757; Paust, *Rediscovering the Relationship*, *supra* note 2; see also Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U.L. REV. 321, 336–38 (1985). Glennon wrongly suggests, however, that *Brown* supports a claim that Congress could authorize a violation of customary law because the Chief Justice declared that the legislature can consider and modify "questions of policy" or decide not to follow mere "usage." See *id.* at 329 & n.50, 337 & n.118.

²⁰ See 12 U.S. (8 Cranch) at 127–29; see also Paust, *President Bound*, *supra* note 2, at 736, 746–48, and references cited.

What also seems to have been forgotten is the fact that the majority opinion in *The Paquete Habana*, however ambiguous elsewhere, openly affirmed that although Congress may authorize an infraction of, merely, the "usage" of nations, such an infraction cannot be made "even by direction of the Executive, without express authority from Congress."²¹ Since the President cannot order a violation even of "usage," it seems obvious that *The Paquete Habana* affirms that the President is bound by international law.²²

After the decision in *Brown*, an opinion of an attorney general rightly declared that the President has a duty to enforce and to obey "not merely . . . treaties of the United States, but those general laws of nations," laws which are "the laws of the country; to the enforcement of which, the Pres-

²¹ See 175 U.S. at 711 (citing *Brown*).

²² See also Paust, *President Bound*, *supra* note 2, at 727 & n.24, 728 n.24, 731. Professor Glennon has written that I have "mistakenly . . . cited *The Paquete Habana* in support of the . . . proposition, that the President is bound by international law." See Glennon, *supra* note 19, at 337. I still think it evident, however, that the majority opinion has the effect of voiding an executive seizure of an enemy vessel in violation of customary international law, that the express recognition that the Executive cannot order a violation even of "usage" necessarily affirms that the President is bound by international law, and, therefore, that the case certainly does "support" such a "proposition." See also Charney, *supra* note 16, at 917.

Professor Glennon does not refer to the quoted language from *The Paquete Habana*, which cites *Brown*, and seems to have mistakenly assumed that Justice Gray's opinion elsewhere demonstrated an "apparent willingness to except personal orders of the President." See Glennon, *supra*, at 339 (emphasis added). Justice Gray's express language quoted at note 21 *supra* obviously obviates any such interpretation. Moreover, just because Justice Gray said that the Court was "bound" to take judicial notice of a particular rule of international law "in the absence" of a "public act" of the "government" (see 175 U.S. at 708; Glennon, *supra*, at 339 n.133), it cannot rightly be assumed that acts in violation of international law, which is supreme federal law, are authoritative public acts and not acts *ultra vires*. Additionally, it is not safe to assume that relevant acts of a "government" are executive acts and not those of the legislature; and it does not follow that because a court must take judicial notice in such a circumstance that it may not also take judicial notice in others. Here, Justice Gray's opinion in *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (Gray, J., opinion) also seems to be instructive. See note 58 *infra*.

Professor Glennon's main point seems to be that the executive acts in *The Paquete Habana* were those merely of an admiral and not those of the President. See Glennon, *supra*, at 338-39. In a sense, the Court voided the actions involved by separating them from more general orders of the President, while recognizing nonetheless that a President could not lawfully order a violation even of mere usage. The President's orders were broad. As Glennon rightly notes, when the admiral requested specific guidance, he received an "equivocal" response. See *id.* at 339 & n.130. Moreover, even after seizure of the vessels involved and their transit to port, there was no intervention by the President to order their release or later to stop the sale of the vessels. The matter may have been so uncertain that it had to be litigated before the Supreme Court; the Court noted, in fact, that specific guidance for the admiral rested upon "implication and evident intent." See 175 U.S. at 713. Thus, the separation of the admiral's acts from those of the President may not have been apparent until after the Court's decision.

Professor Glennon also states that the "dissenters believed that the President could abandon international law." Glennon, *supra*, at 339 n.135. Justice Fuller's dissent, however, made no such assumption. Instead, Fuller argued that there was no such rule of immunity from seizure, only mere "usage" to that effect or notions of "morality" or "comity," adding: "I am unable to conclude that there is any such established international rule It is not an immutable rule of law . . . not a matter of right It is . . . 'a rule of comity only, and not of legal decision.' . . . [T]hese vessels were not exempt as matter of law" See 175 U.S. at 715-21 (Fuller, C.J., dissenting).

ident . . . is bound to look."²³ Even a Michigan court in 1843 recognized that a "duty" is imposed upon the President by treaties, and that with regard to a particular treaty, "he could execute [such duty] without an act of Congress; the treaty, when ratified, being the supreme law of the land, which the President was bound to see executed."²⁴ In 1855, Justice Curtis, while sitting on circuit, emphatically affirmed that "treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the President, while they remain unrepealed," adding: "no body other than Congress possesses" the power to "refuse to execute a treaty."²⁵ And in 1859, another opinion of an attorney general recognized that the public law of nations "must be paramount to local law in every question where local laws are in conflict" and that what the President "will do *must* of course depend upon the law of our country, *as controlled* and modified by the law of nations."²⁶

In 1862, the U.S. Supreme Court recognized once again that the President "is bound to take care that the laws be faithfully executed," including, in context, the customary laws of war.²⁷ And in 1865, an opinion of the attorney general acknowledged that "the law of nations . . . [is] a part of the law of the land," adding: "laws of nations . . . are of binding force upon the departments and citizens of the Government. . . . Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government [to do so either]."²⁸ Importantly also, in 1884, the Supreme Court reaffirmed earlier language that "'treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the President, while they continue unrepealed.'"²⁹

In 1890, the Court noted in addition that the duty faithfully to execute treaties implicitly includes all "obligations growing out of . . . our international relations."³⁰ Five years later, a federal district court reaffirmed that "the duty and obligation rests upon the executive branch" to comply with a treaty.³¹ Thus, by 1900, the date of Justice Gray's opinion in *The Paquete Habana*, relevant trends in legal decision from the time of the Framers to the 20th century clearly supported the expectation that the President is bound by supreme federal law whether that law is customary or treaty-based. Indeed, by 1900, the point was simply beyond responsible debate.

²³ 1 Op. Att'y Gen. 566, 570-71 (1822). See also 2 F. WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 67 (1886) ("obligation upon each and every department of the Government").

²⁴ *Stockton v. Williams*, Walk. Ch. 120, 129 (Mich. 1843), quoted in *Francis v. Francis*, 203 U.S. 233, 240 (1906).

²⁵ *Taylor v. Morton*, 23 F.Cas. 784, 786 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, J., on circuit), *aff'd*, 67 U.S. (2 Black) 481 (1862).

²⁶ See 9 Op. Att'y Gen. 356, 362-63 (1859) (emphasis added).

²⁷ See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) (the same Court that affirmed *Taylor v. Morton*, *supra* note 25).

²⁸ 11 Op. Att'y Gen. 297, 299-300 (1865); see also 2 F. WHARTON, *supra* note 23.

²⁹ *Chew Heong v. United States*, 112 U.S. 536, 563 (1884) (quoting *Taylor v. Morton*, *supra* note 25).

³⁰ See *In re Neagle*, 135 U.S. 1, 64 (1890).

³¹ *United States v. Mullin*, 71 F. 682, 684, 686 (D. Neb. 1895).

Justice Gray's opinion, moreover, recognizably affirmed that the President is bound by international law.³² In two other Supreme Court cases, in 1906 and 1936, the Court also affirmed that the President has no authority or power lawfully to act inconsistently with a treaty obligation.³³

Writing in the *Journal*, Professor Henkin rightly stresses that "the President has no power—as such—to violate international law, just as he has no power—as such—to repeal a treaty or a customary principle as law of the land."³⁴ He also states that "[t]he President's duty to take care that the laws be faithfully executed includes . . . treaties and principles of customary law."³⁵ Professor Glennon agrees that "the President has no plenary power to act in violation of international law,"³⁶ and that "no one in the executive branch has the authority to breach customary international law."³⁷ Professor Charney even admits that "customary international law is law of the United States and is binding as such on all, including members of the executive branch."³⁸ As the past trends in actual decision demonstrate, standing alone, such statements are generally correct. Each of these writers, however, openly or seemingly claims that we should adopt some variation or exception to the constitutionally based requirement that the President obey and faithfully execute international law. As demonstrated in this essay, however, the line between permissible discretion and law still "is one that must be drawn by the judiciary" and "one that must forever hold against every attempted break and any claimed exception."³⁹

The reader will recall that Professor Henkin rightly stresses in the *Journal* that if an international norm no longer exists or if it has somehow been "superseded," then presidential actions inconsistent with such a prior law or a law that has, as a matter of law, been superseded would be permissible.⁴⁰ There simply would be no conflict with extant and operative law. One can debate whether, in a given case, an international norm was no longer in

³² See, e.g., note 22 *supra*.

³³ See *Valentine v. Neidecker*, 299 U.S. 5, 14 & n.12, 18 (1936); *Francis v. Francis*, 203 U.S. 233, 240, 242 (1906).

³⁴ See Henkin, *The President and International Law*, 80 AJIL 930, 936 (1986).

³⁵ *Id.* at 934.

³⁶ See Glennon, *Can the President Do No Wrong?*, 80 AJIL 923, 924 (1986); see also Glennon, *supra* note 19, at 325, 330–39, 352 & n.231.

³⁷ Glennon, *supra* note 36, at 927; see also *id.* at 930.

³⁸ See Charney, *supra* note 16, at 919; see also *id.* at 917.

³⁹ See Paust, *President Bound*, *supra* note 2, at 766.

⁴⁰ See Henkin, *supra* note 34, at 934–36. Here, it is not worth inquiring further whether or when a particular law might "die" or somehow be "superseded," whether or when nonlaw changes to a valid norm, or whether vague and "soft" rules change to "hard" law. The present inquiry assumes that at the relevant social moment (e.g., when a President acts or fails to act) an international law is at stake. Nonetheless, it may be worth noting that my reading of *Sabbatino* (376 U.S. 398 (1964)) and *The Paquete Habana* allows recognition of the need for the judiciary to seek to identify, clarify, supplement and apply relevant international law, but only when such law actually exists. See Paust, letter, 18 VA. J. INT'L L. 601 (1978); see also *The Concept of Norm: Toward a Better Understanding of Content, Authority, and Choice*, 53 TEMPLE L.Q. 226, 240–50 (1980). In this sense, I assume that what some might term "soft" law is still, if not by definition, law. The main point is that the President is bound by law when authoritative law actually exists. See also note 73 *infra*.

existence or operative, but operative law certainly must be obeyed and faithfully executed.

He next asserts that a President acting "within his constitutional powers" or "authority" could engage in conduct that is not violative of international law as such, but has the effect of "ending an international obligation."⁴¹ One can agree with this assertion, although Professor Henkin also stresses that "the question" then becomes "whether he has constitutional authority to do the act."⁴²

Professor Henkin, however, sometimes fails to acknowledge this important question. For example, he asserts that the President is acting in an authoritative or constitutional manner by "making" what otherwise would be a valid executive-created "law" even though such "law . . . would supersede a treaty or principle of international law."⁴³ He assumes that such an executive-created "law" "supersedes" inconsistent international law,⁴⁴ and would be a "controlling" executive act within the meaning of *The Paquete Habana*.⁴⁵ Yet such an assumption also assumes an answer to the very question at stake, i.e., whether the President has any constitutional authority to permit such "disregard" of international law or whether the President is acting under or within his constitutional authority when he does not faithfully execute international law and attempts to create an inconsistent executive-created "law."

I know of no judicial precedent that expressly favors such a preference, nor apparently does Professor Henkin. Moreover, the predominant trends noted above completely undermine any such assertion. Even assuming that it could be possible constitutionally to formulate an inconsistent executive-created "law," it would beg the question additionally to assume that such a "law" should necessarily "supersede" inconsistent international law that is admittedly part of supreme federal law. Here again, the predominant trends cut against Professor Henkin's preference. Indeed, Supreme Court Justices have stressed that "treaties must continue to . . . [be] executed by the President, while they remain unrepealed,"⁴⁶ and that "no body other than Congress possesses" the power to "refuse to execute a treaty."⁴⁷ To echo other trends in decision, the President's power "must of course depend upon the law . . . as controlled . . . by the law of nations";⁴⁸ the President has no authority or power lawfully to act inconsistently with a treaty obligation;⁴⁹ the President cannot authorize or order a violation even of "usage,"⁵⁰ much less international law;⁵¹ and the "Constitution does not permit" the Executive to abrogate or authorize an infraction of the law of nations.⁵²

Moreover, not only does *The Paquete Habana* not affirm that an executive-created "law" that is inconsistent with international law is a "controlling"

⁴¹ See Henkin, *supra* note 34, at 935-36.

⁴³ See *id.* at 936.

⁴⁵ See *id.*

⁴⁷ See text at note 25 *supra*.

⁴⁹ See note 33 *supra* and accompanying text.

⁵¹ See text at notes 10-12 and 28 *supra*.

⁵² See text at note 28 *supra*; see also text at notes 7-9, 13, 23-31 and 33 *supra*.

⁴² See *id.* at 935.

⁴⁴ See *id.* at 936-37.

⁴⁶ See text at notes 25, 29 *supra*.

⁴⁸ See text at note 26 *supra*.

⁵⁰ See text at note 21 *supra*.

executive act (much less an authoritative or constitutionally permissible act),⁵³ but it also clearly affirms that the President cannot lawfully order a violation even of "usage" and, thus necessarily, that an executive order to violate (or that would violate) international law would be impermissible and certainly not a "controlling" executive order. As Professor Henkin admits, *The Paquete Habana* "did not explain . . . which legislative or executive acts were controlling,"⁵⁴ or, it must be emphasized here, whether *any* such acts are "controlling" in the face of identifiable norms of customary international law. The word "controlling" provides no further guidance. Significantly, such an ambiguous criterion has never been adopted by any Justice other than Justice Gray, either before or after his 1900 opinion.

Further, the word "must," which appears in the following quote from *The Paquete Habana* in both the first and the second sentence, is used to demonstrate those situations where custom "must" be applied:

International law is part of our law, and *must* be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort *must* be had to the customs and usages of civilized nations . . .⁵⁵

Justice Gray's opinion did not address those situations where custom "may" or "can" also be applied (or could "only" be applied). The point is all the more important when one realizes that historic use of customary law was both direct and indirect (i.e., as a direct basis for decision and as an indirect basis—for example, as an aid in interpreting a relevant statutory or constitutional provision). Indeed, it has been "applied" and "referred to" when there was also "a treaty," and it has been used even as an aid in interpreting a relevant treaty or federal statute. Thus, an attempt to limit the use of custom to situations where there is no other domestic law would be completely unrealistic in terms of the actual patterns of use by the judiciary both before and after the *Paquete Habana* decision. The Court did not ignore such historic use by stating, falsely, that customary international law can "only" be applied where there is "no treaty, and no controlling executive or legislative act." Nor did Judge McWilliams, in his dissenting opinion in *Rodriguez-Fernandez*, say that custom "can" be used "only" when there is no treaty or controlling domestic law.⁵⁶

Despite these facts, the related points made here about the actual statement of Justice Gray in *The Paquete Habana*, and the rich history of use of custom by federal courts, the Justice Department recently misled a district court judge. In *Fernandez-Roque v. Smith*, Judge Shoob stated *per dicta*, and incor-

⁵³ Precedential use of the word "controlling" also would obviate any such assumption. See text at note 26 *supra* (what President does must be "controlled" by the law of nations).

⁵⁴ See Henkin, *supra* note 34, at 931.

⁵⁵ 175 U.S. at 700 (emphasis added).

⁵⁶ Compare *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1390 n.1 (10th Cir. 1981) (McWilliams, J., dissenting) ("may be used . . . when") with Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143, 150 (1984).

rectly: "according to *The Paquete Habana*, plaintiffs can rely on customary international law *only if* 'there is no treaty and no controlling executive or legislative act or judicial decision.'"⁵⁷ Unfortunately, Professors Glennon and Charney and Reporters' Note 3 to section 135 of the draft *Restatement of Foreign Relations Law* have repeated this sort of error.⁵⁸

On appeal, the erroneous reading of *The Paquete Habana* became even more confused in an opinion by Circuit Judge Johnson. According to Judge Johnson, "public international law is *controlling* only 'where there is no treaty and no controlling executive or legislative act or judicial decision.'"⁵⁹ Of course, no other judge has ever made such a statement and it would still beg the question posed even by such language (i.e., "controlling only where . . . no controlling") to state that executive, legislative or even judicial actions are necessarily "controlling" in the face of conflicting norms of customary international law, a statement that was not made by the judge and that could not be true in the face of predominant trends in decision. Although Judge Johnson did not go on to make such a statement, he did find that there were "controlling acts of the executive and judicial branches" in the

⁵⁷ See 622 F.Supp. 887, 902 (N.D. Ga. 1985).

⁵⁸ See Charney, *supra* note 16, at 913; Glennon, *supra* note 19, at 329 ("only 'where'"); RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §135 Reporters' Note 3 (Tent. Draft No. 6, vol. 1, 1985) [hereinafter cited as RESTATEMENT (REVISED)] (as if it stated "only where . . . or only in"). This one might term the "only where" error.

Again, *The Paquete Habana* made no such statement and such a statement would be erroneous in view of the long history of judicial incorporation of custom. Further, the language in *Paquete* seems to have been borrowed from *Hilton v. Guyot*, 159 U.S. at 163 (Gray, J., opinion), cited in *The Paquete Habana*, 175 U.S. at 700 (Gray, J., opinion). If so, *Hilton* is instructive for its lack of qualifications concerning the use of custom:

International law in its widest and most comprehensive sense . . . is part of our law, and *must* be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty *still* rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so in order to determine the rights of parties to suits regularly brought before them.

Id. (emphasis added). The clear implication is that Justice Gray knew full well that custom could be applied when there was a treaty or statute, but that when there was no treaty or statute, resort must *still* be had to customary international law. No other interpretation of *Hilton* and *The Paquete Habana* makes sense. Indeed, no other interpretation is consistent with historic patterns of use. Further, the statement in *The Paquete Habana* that courts are "bound" to give effect to customary rules "in the absence of any treaty or other public act of their own government" addresses a circumstance, as noted elsewhere in *Paquete* and in *Hilton*, when courts "must" (*Paquete*) apply customary law or must "still" (*Hilton*) apply customary law, not when courts may only apply customary law. It certainly does not declare that customary rules cannot be applied when there is a treaty or other public act; and it does not declare what priority must or can be given either to customary law or to a statute in the case of an unavoidable clash between the two.

⁵⁹ See *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986) (Johnson, J., opinion) (emphasis added), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 107 S.Ct. 289 (1986).

case at hand,⁶⁰ a finding that Professor Henkin has labeled a misinterpretation and misapplication of *The Paquete Habana*.⁶¹

Yet Professor Henkin also opines that a President could act "within the President's constitutional authority as sole organ or as commander-in-chief . . . even if it violates a treaty or principle of law."⁶² But again, this assumes a particular answer to the question whether the President has the constitutional authority to violate "a treaty or principle of law." As the predominant trends in actual decision noted above plainly demonstrate, the President simply has no authority or constitutional power to violate a treaty or law; such an act would be *ultra vires* or without authority.⁶³ Perhaps such an act will not be enjoined by some court; but it should be, since the President not only would be acting without authority, but would admittedly be violating his constitutional duty to take care that international law be faithfully executed.

Here, it should also be stressed that Reporters' Note 3 to section 135 of the draft *Restatement* is actually without support in Supreme Court opinions.⁶⁴ Specifically, neither *The Paquete Habana* nor *Brown*, as explained herein, supports the view that the President can disregard or violate international law;⁶⁵ and neither supports the view that such action would not be *ultra vires* or without authority. Indeed, the actual language in both cases and the predominant trends in decision demonstrate that Reporters' Note 3 is in error.

The recognitions above also apply to some of the statements by Professor Charney about an assumed authority to disregard or violate international law. As noted, his assertions apparently are hinged upon a misreading of *Brown* and *The Paquete Habana*.⁶⁶ It is evident especially that he relies in part upon an erroneous interpretation of the use of the word "usage" in *Brown*,⁶⁷ and he disregards the necessary implication in *The Paquete Habana* that since the President cannot violate mere "usage," he must certainly be bound by international law. In any event, as the predominant trends in actual decision affirm, the President must obey and faithfully execute international law, and

⁶⁰ *Id.* at 1455.

⁶¹ See Henkin, *supra* note 34, at 936.

⁶² See *id.*

⁶³ See also Paust, *President Bound*, *supra* note 2, at 724, 727, 740-58, and numerous references cited; Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1510-15, 1520, 1530-31, 1534, 1539-45 (D.C. Cir. 1984) (en banc), *vacated and remanded on other grounds*, 53 U.S.L.W. 3824 (U.S. May 20, 1985). Since Professor Henkin referred to "law" generally, not merely to international law, it may be worth quoting just one more of several such cases. *United States v. Lee*, 106 U.S. 196, 220 (1882): "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, . . . are bound to obey it."

⁶⁴ See note 58 *supra*; Paust, *Rediscovering the Relationship*, *supra* note 2. Theoretical speculation aside, one cannot restate law by ignoring predominant patterns of generally shared legal expectation and emphasizing a questionable reading of a few cases. Judges have already been misled. See text at notes 57 and 59-61 *supra*.

⁶⁵ See text at notes 17-22 and 32 *supra*; note 58 *supra*.

⁶⁶ See text at note 16 *supra*; Charney, *supra* note 16, at 913, 918, 921-22. But see *id.* at 917. These include the "usage" error and the "only when" error. See notes 16 and 58 *supra*.

⁶⁷ See note 16 *supra*; see also text at notes 16-20 *supra*.

if the President violates that law he acts without authority, beyond constitutionally prescribed powers.

As noted by Professor Glennon,⁶⁸ Professor Charney also assumes incorrectly that the power to engage in the international lawmaking process belongs to the President alone.⁶⁹ Professor Glennon rightly adds that the courts, Congress and the executive branch "all partake in the process of customary law formation and transformation."⁷⁰ Indeed, there are many more participants in that process, and early judicial expressions affirm the expectation that customary international law actually rests upon the "common" or "general consent of mankind,"⁷¹ not merely that of official state elites. Further, because the President is involved in the process, it simply does not follow that the President can or must violate customary law. Such an argument might allow any of us, as participants, a right to violate law in order merely to change it. The President, for example, could participate effectively in the reshaping of attitudes and thus knock out one of the necessary supports of ongoing customary international law termed variously *opinio juris*, patterns of generally shared legal expectation, and so forth.

There simply is no need for greater "flexibility" to violate such law in order to participate effectively in the reshaping or termination of a customary norm. To argue that participation in a violation of international law is merely "legitimate" participation in the "development" of custom gives comfort to all those leaders, throughout history, who have wrought evil social consequences by holding themselves above international standards of acceptable behavior.⁷² Moreover, it contains the hidden assumption that a violation of

⁶⁸ See Glennon, *supra* note 36, at 926, 929.

⁶⁹ See Charney, *supra* note 16, at 917-18.

⁷⁰ See Glennon, *supra* note 36, at 929.

⁷¹ See, e.g., *The Scotia*, 81 U.S. (14 Wall.) 170, 187-88 (1871) ("common consent of mankind"); *The Prize Cases*, 67 U.S. (2 Black) at 670 ("founded on the common consent as well as the common sense of the world"); *The Antelope*, 23 U.S. (10 Wheat.) 66, 115, 119, 121 (1825); *Ware v. Hylton*, 3 U.S. (3 Dall.) at 227 ("established by the general consent of mankind"); 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 66 (1765) ("law of nations is . . . established by universal consent among the civilized inhabitants of the world" and "all the people"); H. GROTIUS, *DE JURE BELLI AC PACIS*, preface, sec. 40; bk. I, ch. I, pt. XIV (1625, Carnegie Endowment trans. 1925).

⁷² See also Justice Jackson's warning at Nuremberg: "We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to law," quoted in Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT'L L. 283, 303 (1986). If one is seriously interested in Justice Jackson's scheme (see Charney, *supra* note 16, at 918 nn.13-14; Glennon, *supra* note 19, at 324), one must also pay attention to such recognitions by Justice Jackson and to his other statements in *Youngstown*, such as: "the Executive [must] be under the law." See Paust, *President Bound*, *supra* note 2, at 750-51 & nn.127-28, 755 n.144.

Professors Charney and Glennon would surely resist any effort to misread Jackson and ignore predominant trends in decision to support an antidemocratic, unconstitutional, and unreviewable executive power in the area of "foreign affairs." At Nuremberg, Justice Jackson related such claims to "evil"; and District Judge Herbert Stern made a similar recognition after heroically opposing such claims in the *Tiede* case. See, e.g., H. STERN, *JUDGMENT IN BERLIN* 95, 98-99, 109-24 (1984); Justice Jackson, opening statement at Nuremberg, in 1 *THE TRIAL OF GERMAN MAJOR WAR CRIMINALS* 49-50 (1946); Gordon, *American Courts, International Law and "Political Questions" Which Touch Foreign Relations*, 14 INT'L LAW. 297, 316-17, 328, *passim* (1980); Paust,

law can be part of a "legitimate" strategy to change or "develop" such law.⁷³ To argue further that Congress could approve such action and thus "eliminate any domestic law questions so long as there was no violation of the U.S. Constitution"⁷⁴ is similarly dangerous and nearly begs another set of questions, e.g., whether Congress could authorize any such infraction. As noted above, legally relevant expectation has been that "Congress cannot abrogate [laws of nations] or authorize their infraction."⁷⁵ As mentioned in other writings, although Congress may have the power to repeal the domestic effect of a treaty, no Supreme Court opinion affirms that Congress can authorize an infraction of customary international law; and the predominant trends in decision (however few) support the primacy of customary international law in the case of an unavoidable clash with a federal statute.⁷⁶ *The Paquete Habana*, it can be added, expressly noted a power of Congress to authorize an infraction of merely the "usage" of nations.⁷⁷

These last points seem to pose a disagreement between the views of all three writers and my own preference for the primacy of customary international law in the face of an unavoidably conflicting federal statute. Such a debate, however, is best left to other writings demonstrating the actual trends in legal decision, the proper interpretation of potentially conflicting judicial statements and analyses of related issues. Nevertheless, it is worth stressing that the notion that Congress could rightly authorize a violation of customary international law is without Supreme Court approval and that a few Supreme Court opinions, plus other trends in legal decision, actually support the primacy of customary international law.⁷⁸ Finally, one such writing demonstrates judicial recognition of at least four exceptions to the last-in-time rule,⁷⁹ thus compelling recognition of several exceptions to Professor

President Bound, *supra* note 2, at 723-25, 729-30; see also *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119 (1866) ("By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers . . .").

⁷³ Certainly a President, as anyone else, might choose to violate a law as part of a strategy to change that law. It does not follow, however, that because one might violate a law in an effort to change it, one can do so free of relevant civil or criminal sanctions or that such an effort is "legitimate." In addition, merely because some law violator had not suffered some sanction and had even caused others later to change a law, it does not follow that a violation of that law did not occur or that the violator, at the time, had a right to violate that law. Moreover, to pretend that law is disembodied from social reality—indeed, that it must tolerate violations of itself—can lead to the same set of errors. One should focus on the relevant social moment (see note 40 *supra*) and actual patterns of expectation and behavior then extant.

⁷⁴ See Charney, *supra* note 16, at 919.

⁷⁵ See text at note 28 *supra*; see also notes 13, 26 *supra*.

⁷⁶ See Paust, *Rediscovering the Relationship*, *supra* note 2.

⁷⁷ See note 21 *supra*.

⁷⁸ See Paust, *Rediscovering the Relationship*, *supra* note 2; see also Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1134-47 (1985); Paust, viewpoint, INT'L PRACTITIONER'S NOTEBOOK, No. 21, January 1983, at 18; *id.*, No. 23, July 1983, at 10, 12. But see Goldklang, *id.*, No. 22, April 1983, at 16.

⁷⁹ See Paust, *Rediscovering the Relationship*, *supra* note 2. These are termed: (1) the indirect incorporation exception, (2) the "executed or vested" rights exception, (3) the "rights under treaties" exception, and (4) the war powers exception.

Henkin's statement about "controlling" acts of Congress.⁸⁰ Here again, moreover, the so-called draft restatement either is in error or is needlessly incomplete and misleading.⁸¹

In conclusion, actual trends in legal decision affirm emphatically that the President cannot lawfully violate international law. In view of the actual trends and the legal policies at stake, there is simply no viable counterargument. The President must obey and faithfully execute such law. Moreover, in this bicentennial year, these trends in decision are not merely determinative, they are worth celebrating. Through 200 years, such a fundamental legal expectation has reflected America at its best.

JORDAN J. PAUST*

⁸⁰ See Henkin, *supra* note 34, at 932.

⁸¹ Compare RESTATEMENT (REVISED), *supra* note 58, §§131(3) and 135(1), and §135 comments a, d and e, with Paust, *Rediscovering the Relationship*, *supra* note 2.

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CORRESPONDENCE

TO THE EDITOR IN CHIEF:

In his response to Professor Franck, in the January 1987 issue of this *Journal* (p. 195), Allan Gerson—invoking the terms of reference of the United Nations Administrative Tribunal (UNAT)—appears to suggest that a candidate with a strong background in U.S. labor law is as qualified to sit on UNAT as a person who has spent most of his professional life as a distinguished practitioner of international law and international organization law, including 6 years on UNAT. For students of international administrative law, Mr. Gerson's approach gives rise to some perplexity.

UNAT does not apply U.S. labor law and does not perform labor arbitrations. Ranging far beyond contracts of employment, UNAT's jurisprudence is based on a wide range of sources of international law and international administrative law, including the Charter of the United Nations and general principles of law; Staff Regulations adopted by resolutions of the General Assembly; Staff Rules promulgated by the Secretary-General, which must be consistent with the regulations; administrative instructions, which elaborate on the Staff Rules; and personnel directives.¹

In its practice, the Tribunal has routinely scrutinized the exercise of discretion by the Secretary-General according to the yardsticks of reasonableness and due process of law. In the political, multinational context in which the policies of the Secretariat operate, UNAT has questioned discriminatory practices and decisions based on extraneous or political considerations.² Some of its decisions have turned on compliance by the Secretary-General with the principles stated in Articles 100³ and 101⁴ of the Charter, which have become the subject of challenge.⁵ To state the obvious, the broad range of issues addressed by the Tribunal clearly requires expert knowledge of the law and practice of international organization. The legal and political importance of a number of cases that have come up for UNAT's decision is demonstrated by the recent reference, on the initiative of the United States, of the *Yakimetz* case to the International Court of Justice for an advisory opinion.⁶ It is surely because of recognition of the complexity and significance

¹ See generally T. MERON, *THE UNITED NATIONS SECRETARIAT* 60-66 (1977).

² *Id.* at 159-71.

³ Article 100 states, in part, that the Secretary-General shall not seek or receive instructions from any government or from any other authority external to the United Nations, and that each member state shall respect the exclusively international character of the responsibilities of the Secretary-General.

⁴ Article 101(3) provides, in part, that the paramount consideration in the employment of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity.

⁵ See generally Meron, *In re Rosescu and the Independence of the International Civil Service*, 75 AJIL 910 (1981); *Estabial v. Secretary-General of the United Nations*, UN Doc. AT/DEC/310 (1983).

⁶ *Yakimetz v. Secretary-General of the United Nations*, UN Doc. AT/DEC/333 (1984), was an appeal against the nonextension of the appointment of a staff member from the Soviet Union after his application for asylum in the United States. On Aug. 28, 1984, the Committee on

of the issues and of the international law norms implicated in UNAT's proceedings that, in the past, the United States has nominated to the Tribunal UN experts of the stature of Francis Plimpton and Herbert Reis; France, such distinguished international lawyers as Professors Suzanne Bastid and Roger Pinto; and Hungary, Professor Endre Ustor.

Of course, nominating generalists is very much in our national tradition, but UNAT is an institution for which a specialist is clearly called for. The decision of the administration in this case is even more difficult to understand because it declined to renominate a specialist who has performed with great distinction.

I am confident that Mr. Jerome Ackerman will serve the Tribunal ably and conscientiously. But I am distressed by the decision to search for an alternative to Vice-President Reis. His replacement by anyone but an outstanding expert in the law of international organization does not further our national interest to have the strongest possible representation on UN judicial bodies.

THEODOR MERON

TO THE EDITOR IN CHIEF:

November 24, 1986

My short essay, *Superior Orders vs. Command Responsibility*, was published in the July 1986 issue of the *Journal* (80 AJIL 604), accompanied by a Comment by Professor Howard S. Levie. He undertook to demonstrate, by an analogy to a hypothetical Cosa Nostra situation, that my essay "raised a straw man that will be blown down by a very slight puff of wind" (p. 610).

While many readers may read the two essays and judge the merits for themselves, I want to make a brief rejoinder to Professor Levie for the record.

Although I appreciate Professor Levie's taking the time to respond to my essay, the analogy he uses is entirely irrelevant. What makes the problem of "superior orders" in the laws of war so difficult is precisely the fact that the army command situation requires that orders be obeyed and that, from the soldier's point of view, his commander's orders are presumptively legal. In a Cosa Nostra situation, a "soldier" ordered to make a "hit" is not operating under even the remotest notion that the order to commit murder is legal. Of course the "hit man" is guilty of murder. Of course the person who hired him to do it is also guilty. But these conclusions say absolutely nothing about the problem of superior orders in a true military situation.

Since Professor Levie bases his entire argument against my essay on this analogy, which is clearly irrelevant, little needs to be added here. Yet, for those who like intellectual puzzles, it might be interesting to work out what the result would be in the Cosa Nostra case if Professor Levie's analogy *were* relevant. Is the "godfather" really responsible for giving the illegal "hit"

Applications for Review of Administrative Tribunal Judgments decided that there was substantial basis for the application for review. The International Court of Justice has not, as yet, pronounced its advisory opinion on the *Yakimetz* case.

order? Rather, is he not responsible for *hiring* the hit man? What is the *force* of the order itself, taken apart from the situation in which someone is hired to commit an act? In the military situation, the force comes from the apparent legality of the order. Since that apparent legality is absent in the Cosa Nostra situation, the force may come instead from an exchange of money. Hence, it is possible, using my analysis in the essay, to look more deeply into the question of domestic criminal law to find the true elements of murder-for-hire or coconspiracy. Professor Levie's Comment may thus have opened up an interesting inquiry into domestic criminal law even if it had little to do with superior orders and command responsibility.

ANTHONY D'AMATO

TO THE EDITOR IN CHIEF:

February 12, 1987

In his reply to Larry Garber's letter (81 AJIL 185 (1987)), John Moore suggests that Donald Fox and I, authors of a 1985 report on contra human rights abuses,¹ were duped by officials of the Nicaraguan Government. "Sincere,"² but "naive"³ and "sloppy,"⁴ we allowed Sandinista propagandists to sway our conclusions through manipulation of our methodology.

Moore endeavors to discredit our report by attacking not its findings but its methodology. He does not dispute its findings for good reason: every impartial, independent human rights organization that has investigated contra activities has reached the same conclusion—that the contras are engaged in frequent and significant abuses of the rights of Nicaraguan civilians. Americas Watch, for example, reported in March 1985 that the contras "practice terror as a deliberate policy."⁵ Amnesty International in March 1986 found that operational tactics of the contras included routine "torture and summary execution" of captives.⁶ Another Americas Watch report, filed in February 1987, said that the contras "still engage in selective but systematic killing of persons they perceive as representing the Government, in indiscriminate attacks against civilians or in disregard for their safety, and in outrages against the personal dignity of prisoners"; and that the "contras also engage in widespread kidnapping of civilians, apparently for purposes of recruitment as well as intimidation."⁷ The report continued: "the escalating brutality of contra practices . . . leads Americas Watch to conclude that disregard for the rights of civilians has become a de facto policy of the contra forces."⁸

¹ D. FOX & M. GLENNON, REPORT TO THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AND THE WASHINGTON OFFICE ON LATIN AMERICA CONCERNING ABUSES AGAINST CIVILIANS BY COUNTERREVOLUTIONARIES OPERATING IN NICARAGUA (1985) [hereinafter cited as REPORT].

² Moore, *The Secret War in Central America and the Future of World Order*, 80 AJIL 43, 123 n.333 (1986) [hereinafter cited as Moore].

³ Moore, Reply to the letter by Larry Garber, 80 AJIL 186, 193 (1987) [hereinafter cited as Reply].

⁴ *Id.*

⁵ AMERICAS WATCH, VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA 1981-85, at vi (March 1985).

⁶ AMNESTY INTERNATIONAL, NICARAGUA: THE HUMAN RIGHTS RECORD 32 (March 1986).

⁷ AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA: 1986, at 5 (February 1987).

⁸ *Id.* at 18-19.

Moore, again, does not purport to *refute* these charges because he cannot. There are no contradictory data from the Department of State on which he might rely. As one high-ranking State Department official candidly told us, the United States policy has been one of "intentional ignorance."⁹ The CIA, he said, had not been "tasked" to ascertain what the contras were doing to Nicaraguan civilians.¹⁰ As a consequence, another said, the State Department is not aware of the validity of "any or all" of the allegations of contra abuses.¹¹ It is thus no surprise that two requests from Amnesty International over the last year for State Department comment on reports of contra abuses should yield the same response—no answer.¹²

I.

The report's methodology, therefore, is of necessity Moore's target. Essentially, he makes six points.¹³

First, he criticizes the composition of the delegation. Fox, he suggests, was not qualified to participate because some relative of Fox's wife works for the Nicaraguan Government. Who? How distant a relative? How significant a government job? When did Fox's wife last see the relative? Has Fox, indeed, ever met the relative? Moore evidently has no idea, but none of this matters: Fox has an "appearance" of conflict of interest and should not have been selected. In fact, Fox has family, friends and acquaintances on both sides of the Nicaraguan conflict. And "appearance" of conflict of interests is easily created—in connection with either side—through the selective identification of associations.

But that appearance would be misleading. To whatever extent it might be relevant, all I knew about Fox's wife's politics I learned before the investigation began, and that is that she was a supporter of President Reagan and an opponent of the Sandinistas. I was not involved in Fox's selection, but if I had been—knowing everything I know now—I would have picked him without hesitation. He is a person of integrity, judgment and skepticism, and I considered it a privilege to work with him.

Moore suggests that the mission was "overly narrow"¹⁴ and would have been more effective had it included more people and different sponsors. He prefers a mission modeled after a mission to El Salvador in which he participated, with "a number of congressmen and senators."¹⁵ I am a strong believer in visits by members of Congress to foreign countries; such trips can be highly educational as consciousness-raising activities. That purpose needs

⁹ See REPORT, *supra* note 1, at 21.

¹⁰ *Id.* at 20.

¹¹ *Id.*

¹² Telephone interview with Kathleen Smith, Press Officer, Amnesty International (Feb. 11, 1987).

¹³ Apparently intending rhetorical effect, Moore raises a variety of objections that have no bearing on the reliability of our methodology or the probity of the report's conclusions. He complains, for example, that a public relations firm that had some relationship with the sponsoring organizations also had Maurice Bishop's Grenada as a client. Similarly, he writes that Fox "may not even have been aware," Reply, *supra* note 3, at 191 n.16, of my meeting with Reichler and an Interior Ministry official, and that one of us—he does not specify which—"expressed doubts about the questioning of the other," *id.* at 193. This comment considers only those of Moore's remarks that have some bearing on the point he tries to establish.

¹⁴ *Id.* at 190.

¹⁵ *Id.*

to be distinguished, however, from the objectives of a human rights fact-finding mission focused on antigovernment rebels. Such a mission can involve riding in the back of a dusty pick-up truck, sleeping on the floor and listening to machine-gun fire as one falls asleep. The congressional delegations in which I have participated would not easily have adapted to those conditions. It is hard to see how such a delegation could be more effective than two or three low-profile investigators who are able, with minimal security, to move quietly about the countryside. I would be delighted if "distinguished" individuals would go to Nicaragua and talk to the people we interviewed, as Moore seemingly suggests. But their absence from our mission did not seem to me reason to cancel it.

The relevance of Moore's observation that the Washington Office on Latin America (WOLA) is "well known for its opposition to U.S. policy in Central America"¹⁶ is unclear. (Moore has difficulty determining which human rights organization is the most pernicious in its anti-American bias. It may be a close call, but Americas Watch, Moore concludes, "seems to be the most sympathetic toward the Sandinistas."¹⁷) Apparently, Moore means to impugn the objectivity of groups critical of the administration. Precisely what makes them unobjective, we are not told. The implication seems to be that they are untrustworthy to the extent that their assessment of the contras does not match that of the State Department, which is, to Moore, a shining temple of investigative probity (a conclusion unaffected by the fact that, with respect to the contras, the State Department is not even in the investigation business). I suppose "objectivity" is a subjective concept, but here it seems to relate not to the identity of the researcher, but to an identity of findings by different researchers using different methodologies.

Second, Moore asserts that our inquiry "seems to have been intertwined with the Government of Nicaragua."¹⁸ As a preliminary matter, it is worth noting that respected human rights scholars have perceived no impropriety in contacts with a government even when its own trial procedures are being investigated by a fact-finding team. Professor Weissbrodt, for example, *recommends* that trial observers make contact with governmental officials for the purpose not only of expediting their mission but also of gaining information:

Depending upon the sponsor's instructions and the nature of the case, the observer should contact not only individuals who can facilitate matters such as entry into the courtroom, but also the Ministry of Justice and other government officials who can provide background information, or who should be contacted as a courtesy. The observer should explain that he or she has been sent by the sponsoring organization to observe the trial and prepare a report, but that he or she does not . . . represent the organization in a more general capacity.¹⁹

Moore, seemingly unaware of accepted practice, offers the following evidence of our wrongdoing:

- Nicaragua's lawyer, Paul Reichler, apparently suggested to the sponsoring organizations that they look into allegations of contra abuses. Well, how many other people made the same suggestion? Shouldn't a

¹⁶ *Id.* at 191.

¹⁷ Moore, *supra* note 2, at 123 n.335.

¹⁸ Reply, *supra* note 3, at 191.

¹⁹ Weissbrodt, *International Trial Observers*, 18 STAN. J. INT'L L. 27, 119 (1982).

human rights group *expect* to get such requests? Is there a shred of evidence that Reichler—or anyone else connected with the Nicaraguan Government—*actually influenced* the outcome of the inquiry in any way? The answer, I can attest, is: absolutely not.

- Our inquiry “was significantly channeled toward evaluating a report produced with substantial Sandinista involvement.”²⁰ Not so. As we indicated in our report, both we and our sponsors were aware that Reed Brody had received assistance from the Nicaraguan Government in preparing a report on contra abuses. It was for this reason, we were told, that our sponsors wished us to look into the report before they decided what to do with it. Specifically, as our report says, we were asked to investigate the probative value of a random sample of the 145 affidavits appended to Brody’s study.²¹ This seemed to me an eminently responsible step for our sponsors to take, and one for which they should be commended, not criticized. In any event, our inquiry was not “significantly channeled” toward Brody’s; as Moore himself acknowledges, fewer than one-third of the statements we took were from persons Brody had interviewed²² (Moore, in fact, later criticizes us for interviewing too *few* of Brody’s affiants, not too many²³). Moore’s use of the word “channeled” apparently is intended to imply some sort of compelled, preordained direction—something he can only imply, not corroborate, inasmuch as there is not a scintilla of evidence to support the innuendo.

- I met with Reichler at the time of our arrival. It was improper, Moore suggests, to permit Nicaragua’s lawyer to expedite us through customs.²⁴ I disagree. We decided in Washington, before leaving, that this procedure would comport with standard practice. Time was of the essence (Moore later criticizes us for spending too little time in Nicaragua²⁵) and we believed that every minute should be spent on the business of the trip. Moore ought to understand our desire for expedition, accepting as he did the services of a U.S. government helicopter to ferry him about El Salvador. Clearing customs quickly made possible the meeting that occurred afterwards, to which Moore objects—though he is unaware of its purposes and seemingly unconcerned about them. The first was to interview Reichler, who, we thought, might either have information about contra abuses, or could at least direct us to an official in the Nicaraguan Government responsible for monitoring them. He did in fact give us the name of an official to whom we later spoke.²⁶ Given our inclusion in the report of the statement taken at that interview, it is hard to understand how anyone might feel deceived by our excluding from the report the interview with Reichler. The standard applied for inclusion, as will be discussed below, was materiality, and with all respect to Reichler, my interview with him was otherwise unhelpful. The second purpose was to meet with an Interior Ministry official to obtain a telephone number to call in the event we were arrested, surrounded by the contras or detained. Perhaps Moore

²⁰ Reply, *supra* note 3, at 191.

²² Reply, *supra* note 3, at 192.

²⁴ *Id.* at 191.

²¹ See REPORT, *supra* note 1, at 2.

²³ *Id.*

²⁵ *Id.* at 192, 194.

²⁶ Moore’s reliance on this interview is most interesting. See *infra* text accompanying notes 61–62.

would have taken no security precautions. Given his own preferred mode of transportation, it is understandable that he should find it difficult to relate to mundane considerations like physical safety. In any event, those were the only purposes of the meeting. The suggestion that it was somehow tied to my subsequent testimony before the International Court of Justice (which I was not asked to do until months after the report was filed) is unworthy of comment.

• Our report is "significantly flawed" by the "use of a Sandinista car and driver."²⁷ Nowhere did Moore acknowledge, although our report is explicit on the point, that the car was rented at market rates or that the driver was hired; Moore does note that the car was unmarked, and that we indicated in the report that the driver kept clear of our interviews.²⁸ Neither Fox nor I was able to detect the faintest effect of hiring a car and driver on our inquiry and I am unable today—as is Moore—to point to any reason to believe that these arrangements tainted our conclusions. The best he can come up with is conjecture: we "seem insensitive to the fact that [our] government driver could certainly know [our] whereabouts."²⁹ Apparently, Moore intends to suggest that while Fox and I were interviewing, our driver was out and about rounding up witnesses. I did check up on the fellow from time to time during breaks in our interviews and can report that his primary objective appeared to be to catch up on his sleep.

Third, Moore maintains that the "procedures for the selection of persons interviewed" were unreliable.³⁰ The problem, it appears, is nothing specific in either our selection criteria or the manner in which they were applied; the problem is that some Nicaraguan defector is reported to have claimed that some foreign visitors were intentionally exposed to certain Nicaraguans. But what exactly were his responsibilities for the Nicaraguan Government and what qualifies him to know this? What foreign visitors were involved? Where? When? Were they told lies? On what subjects? Moore, again, apparently has no idea—indeed, he candidly acknowledges that the fellow's statements "have not been independently cross-checked" by him³¹—or, evidently, by anyone else.

Fourth, we spent only 4 days in the field; after so little time, how can we really be so sure that the contras are doing these things? The question contains the answer: if in that relatively short period it is possible to encounter credible evidence of 16 murders, 44 kidnappings, one rape, and numerous instances of beatings and destruction of property,³² there is every reason to believe that those numbers could be extended—and extended substantially³³—by a longer investigation.

Fifth, we do not quantify precisely our methodology; we do not, for example, say what percentage of interviews were cross-checked, or what percentage of incidents were cross-checked. Moore provides us with an "instructive" example in the "specificity with which cross-check methodology is developed and discussed":³⁴ a study purporting to have calculated, through statistical techniques, the number of persons killed in Vietnam after the war

²⁷ Moore, *supra* note 2, at 123 n.333.

²⁸ Reply, *supra* note 3, at 192.

³¹ *Id.* at 189 n.7.

³³ *Id.*

²⁸ See REPORT, *supra* note 1, at 9.

³⁰ *Id.*

³² REPORT, *supra* note 1, at 18.

³⁴ See Reply, *supra* note 3, at 192.

ended.³⁵ In fact, there is *no* quantification of cross-checking described anywhere in that report. The closest that the authors come is to indicate that "a substantial number" of victims were named by more than one person interviewed (all of whom were refugees): "A substantial number of our fully identified victims were named by more than one respondent, and were therefore duplicates. That diverse respondents independently reported the execution of the same individual gave us confidence in the reliability of our data."³⁶ There is *no* indication as to "what percentage of interviews relied upon were cross-checked."³⁷ There is *no* indication as to "what percentage of incidents discussed were corroborated through cross-checks."³⁸ Moreover, there is no indication that any "techniques were used to verify that those perpetrating incidents" were actually officials of the Vietnamese Government.³⁹ The authors openly admit that they simply *assumed* "that people who reported in convincing detail about persons who were incarcerated or executed were probably telling the truth."⁴⁰ So far as I can see, they do not even use the word "cross-check." Although, as noted above, they describe statements that in some respects happened to be duplicative, *they do not claim to have made any special effort to cross-check so much as a single statement or a single incident.* An "instructive" model indeed!

I wish to be clear: I do not fault the "Vietnam blood bath" researchers for failing to quantify cross-checking. Standard human rights fact-finding techniques simply do not lend themselves to mathematically precise quantification of that sort. Statistical methods might provide specious support for a given study, but however easy it would be, such buttressing would be precisely that—specious. Statistics concerning these matters say nothing about the relationship of the persons interviewed to each other, their demeanor or credibility, the extent of their recall or basis of their knowledge. These and multiple other factors affect the weight that can be accorded their statements.

It thus will come as no surprise that none of the developing literature on the subject of on-site human rights investigations recommends such statistical smoke screens.⁴¹ Our report makes clear that we believed that any pretense of mathematical precision would inevitably be misleading—and that analogical verbal formulations were similarly suspect. We rejected, for example, any use of the term "pattern" in reference to violations. It is "unclear," we said, "what level of frequency is required before a high level of frequency is properly called a 'pattern,' or before a pattern is called a 'consistent pattern.'"⁴² We acknowledged that the methodology employed could not "provide knowledge to a certainty," but only a "level of probabilit[y]":

How frequently do such abuses occur? There are, in general, two methods of seeking to determine whether a "pattern" exists of these sorts of violations. The first is to canvass all available evidence—in this case, to interview everyone alleging some abuse by the Contras, and to delve thoroughly into the facts related by those interviews. This kind of comprehensive review is the only way of knowing with certainty

³⁵ Desbarats & Jackson, *Vietnam 1975–1982: The Cruel Peace*, WASH. Q., Fall 1985, at 169.

³⁶ *Id.* at 176.

³⁷ See Reply, *supra* note 3, at 192.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Desbarats & Jackson, *supra* note 35, at 176.

⁴¹ See *infra* note 48.

⁴² REPORT, *supra* note 1, at 19.

whether an actual pattern exists. It obviously was not possible to conduct such a review in the period of one week we spent in Nicaragua.

The second method is to gather as much information as possible, to make reasonable efforts to distinguish between probative and non-probative evidence, and to draw reasonable inferences from the evidence that appears probative. This method does not produce knowledge to a certainty; it merely alleges varying levels of probabilities, depending upon the care with which each stage of the investigatory process is conducted. The limited time and amount of resources available made it necessary to employ this second, inferential method. *We have framed our conclusions accordingly, using concepts such as the "rebuttable presumption," "prima facie," and "shifting the burden of persuasion" to reflect the measure of reliability we believe those conclusions merit.*⁴³

(I comment below on this important element, which Moore understandably ignores altogether; namely, the calibration of the findings to reflect the level of exactness afforded by the methodology. It is worth underscoring that investigatory findings need not be binary, that a report need not be painted only in blacks and whites, and that there are such things as qualification and nuance—with which this particular report happens to be filled.)

Sixth, Moore faults our questioning of witnesses. One of his criticisms is that our questions are not included in the report. The "instructive" Vietnam blood-bath study⁴⁴ from which Moore learned so much contains not a single interviewer's question. We excluded our questions, as well as some statements, because our sponsors did not have the financial resources to reproduce every interview conducted over the course of our investigation.⁴⁵ Moore, however, infers sinister designs and jumps reflexively to a conspiracy theory: statements concerning membership in the Catholic Church or the Communist Party are evidence of manipulation by those orchestrating the "Sandinista public affairs"⁴⁶ campaign. The truth is that I asked all the persons we interviewed, or just about all, about their religion and politics, and those comments were their responses.

⁴³ *Id.* at 17–18 (emphasis added).

⁴⁴ Desbarats & Jackson, *supra* note 35.

⁴⁵ This procedure, it is worth noting, comports with Professor Weissbrodt's Proposed Draft Model Procedures for NGO Fact-Finding:

[I]t does not seem unreasonable to suggest that nongovernmental organizations should expressly state their fact-finding methodology at least in substantial reports on human rights situations. Obviously, every letter, appeal, press release, etc., could not contain such methodological statements—for reasons of economy and effectiveness. But major factual inquiries representing considerable effort and involving a substantial result, such as a report, might contain a sketch of the basic methodology used in deriving the report. Indeed, most sizeable NGO human rights reports do contain at least a paragraph or two concerning methodology used.

Weissbrodt & McCarthy, *Fact-Finding by Nongovernmental Organizations*, in *INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS* 186, 216 (B. Ramcharan ed. 1982).

Our report devoted six pages to describing the methodology used. As in the case of other proposed model rules, our report complies fully with each of Professor Weissbrodt's 12 proposed guidelines, with one exception (paragraph 6). We did not indicate which of us conducted each interview. In fact, we probably conducted 90% of them jointly.

⁴⁶ Reply, *supra* note 3, at 9.

With respect to the exclusion of witness statements, we applied, as indicated above, a standard of materiality. We included some in the report because the words of the victims seemed to us to have a certain poignancy that would be lost in a sterile summary. Few human rights reports include *any* witness statements, let alone questions; they consist entirely of paraphrases and synopses. The Vietnam blood-bath piece⁴⁷ does not set forth a single entire statement. It contains only two- or three-sentence excerpts from about a dozen witness statements—out of a total of 615 refugees interviewed. No “contrary” statement is included. Again, I do not object; I assume that the authors thought, as we did, that the inclusion of a few witness statements would give readers a sense of the horror experienced by real people with real names.

In sum, the growing body of literature on human rights fact-finding⁴⁸ is all but devoid of any support for Moore’s apparent belief that all witness statements, including questions, should have been included in their entirety. Nor, for that matter, does the literature provide any support for his protests concerning nonquantification. Our report comports fully, for example, with the Belgrade Minimal Rules of Procedure for International Human Rights Fact-finding Missions,⁴⁹ which in this regard require only that “the mission’s report should contain the findings of the majority as well as any views of dissenting members.”⁵⁰ The Belgrade Rules do not suggest the desirability of including witness statements, let alone interviewers’ questions. Our report also is in complete accord with apposite provisions of the Draft Rules of Procedure Suggested by the UN Secretary-General for *Ad Hoc* Bodies of the United Nations Entrusted with Studies of Particular Situations Alleged to Reveal a Consistent Pattern of Violations of Human Rights.⁵¹ In short, our report includes each of the “matters [usually] covered in the reports of fact-finding bodies dealing with [particular] situations.”⁵²

Moore’s real objection is a metaphysical grievance that there is no such thing as “full” disclosure. I agree. As Martin Heidegger put it, “where there is disclosure there is also concealment,” meaning that the decision to disclose one thing necessarily is a decision to ignore something else.⁵³

⁴⁷ Desbarats & Jackson, *supra* note 35.

⁴⁸ See, e.g., Weissbrodt & McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*, 22 VA. J. INT’L L. 1 (1981); Franck & Fairley, *Procedural Due Process in Human Rights Fact-finding by International Agencies*, 74 AJIL 308 (1980); Norris, *Observations “in loco”*: *Practice and Procedures of the Inter-American Commission on Human Rights*, 15 TEX. J. INT’L L. 46 (1980); Report of the Secretary-General on Methods of Fact-finding, UN Doc. A/5694 (1964).

⁴⁹ Franck, *Current Developments Note*, 75 AJIL 163 (1981). These were drawn up after 4 years of study by a special subcommittee of the International Law Association, which consisted of representatives from Austria, Bulgaria, Cyprus, Ghana, Kenya, the Netherlands, Singapore, the United Kingdom, the United States and Uruguay. The 59th ILA Conference, held in Belgrade on Aug. 18–23, 1980, approved the rules by consensus. *Id.*

⁵⁰ *Id.* at 165. Fox’s and my findings and conclusions were unanimous.

⁵¹ Reprinted in Ramcharan (ed.), *supra* note 45, at 239.

⁵² These are: (1) appointment, mandate; (2) organization of work; (3) procedure adopted; (4) facts alleged; (5) comments on allegations or rebuttals; (6) evidence obtained, including sources of evidence used and evidentiary criteria followed; (7) standards relied upon; (8) discussions of issues; (9) conclusions and recommendations; and (10) annexes, such as rules of procedure or comments of governments concerned. Van Boven, *The Reports of Fact-Finding Bodies*, reprinted in *id.* at 182.

⁵³ L. ABEL, *IMPORTANT NONSENSE* (1987).

Moore also contends that cross-examination is a technique largely useless except for purposes of impeachment. I disagree.⁵⁴ Cross-examination in a fact-finding investigation (unlike cross-examination conducted during a trial) is not aimed, as Moore suggests, at breaking down a witness,⁵⁵ but at assessing demeanor and thus credibility. As one authority has put it, "The demeanor of a witness may indicate the person's confidence or nervousness, from which a finder of fact may infer the veracity of statements made or merely that the individual has a nervous disposition."⁵⁶ As our report indicates, we excluded statements that were, in our judgment, of doubtful veracity.⁵⁷ Cross-examination facilitated making those judgments.

Moore complains that the "report does not fully present to the reader any contrary views heard by the delegation."⁵⁸ What exactly is a "contrary view"? That the individual interviewed has *not* been victimized by the contras?

Well, we did not accept hearsay; we did not "rely on the statements of persons who had not seen or heard personally the events described."⁵⁹ That, of course, is why statements taken during interviews with persons such as Patricia Baltadono (head of the Nicaraguan human rights group critical of the Nicaraguan Government) and Cardinal Obando y Bravo are not included in the report. We did speak with them for background information and we did seek their impressions concerning the scope of contra abuses (which we alluded to in the report in a reference to other similar hearsay⁶⁰), but neither individual had any personally observed incident to report.

The one exception we made was to include in our report the remarks of Luis Carrión, the Deputy Minister of the Interior. We considered it important to speak with persons in both the Nicaraguan and United States Governments responsible for collecting information concerning the nature and scope of damage inflicted by the contras. (We interviewed him after we returned to Managua, as we did Harry Bergold, United States Ambassador to Nicaragua. The latter interview is not included because Ambassador Bergold asked that it not be.)

It is illuminating to review Carrión's statement—and Moore's use of it—in light of Moore's accusation of imbalance in the selection of statements in the report, as well as Moore's misgivings about our interrogative techniques. In response to a question I asked, Carrión responded: "We are giving no support to the rebels in El Salvador. I don't know when we last did. We haven't sent any material aid to them in a good long time."⁶¹ In his earlier *Journal* article, Moore had no hesitation in relying on Carrión's statement:

Luis Carrión, the Sandinista Vice-Minister of the Interior and a principal witness for Nicaragua before the World Court in the *Nicaragua*

⁵⁴ I should note, however, that here the Vietnam blood-bath report is consistent with Moore's approach. It contains no indication that the authors made any effort through cross-examination to determine the veracity of any of the persons interviewed. Rather, if they related enough detail, they apparently were assumed to be telling the truth. Desbarats & Jackson, *supra* note 35, at 176.

⁵⁵ Reply, *supra* note 3, at 192.

⁵⁶ Weissbrodt & McCarthy, *supra* note 45, at 208.

⁵⁷ See REPORT, *supra* note 1, at 22.

⁵⁸ REPORT, *supra* note 1, at 10.

⁶¹ *Id.*, App. III at 34.

⁵⁹ Reply, *supra* note 3, at 193.

⁶⁰ *Id.* at 12.

case, while reiterating the party line that Nicaragua is not giving support to the insurgents in El Salvador, recently made a statement to a human rights investigating team that indirectly confirmed Nicaraguan involvement: "We are giving no support to the rebels in El Salvador. I don't know when we last did. We haven't sent any material aid to them in a good long time." Interestingly, this statement was reported by a witness for Nicaragua in the World Court case and contradicts the sworn affidavit submitted to the Court by the Nicaraguan Foreign Minister⁶²

Now, Carrión's statement concerning assistance to the Salvadoran guerrillas was elicited through the use of the same techniques that Moore has complained of, yet there is not a hint on Moore's part that that statement is anything less than credible—no concern about leading questions, no concern about cross-checking, no concern about flaccid cross-examination, nothing. Why? I submit that, quite simply, it is because what Carrión said *supports* Moore's contentions.

II.

Moore's approach in attacking our report is summed up in two precepts.

First: *comb innuendo over the bald spots in your evidence*. Do not know whether the sponsors were ever in touch with Nicaragua's lawyer? Stick in a "has-been-said."⁶³ Unclear whether someone was actually present at a meeting? Sprinkle in an "apparently."⁶⁴ Cannot be sure about a firm's clients? Say "there have also been reports that. . . ."⁶⁵ Then, when no one is looking, drop the tentativeness and present a firm conclusion: "None of these interactions. . . ."⁶⁶ Preface all this with a few pages on "context": i.e., repeat uncorroborated assertions of duplicity by a disaffected expatriate with an obvious axe to grind, even though none of his accusations purport to relate to the report under discussion.⁶⁷ Make no effort to verify their accuracy.⁶⁸ Mix it all together and you have the makings for an "objective, hard-hitting" analysis⁶⁹ that does not come out and say the targets are Communist dupes, but then, does not need to.

Second: *avoid any reference to material that does not support your accusations*. Let me reiterate that the findings and conclusions Fox and I reached were meticulously framed to reflect the degree of reliability afforded by our methodology. We made no finding to the effect that there existed a "pattern" of contra abuses.⁷⁰ We recognized that "[i]t is possible that some of the statements we took are false or exaggerated."⁷¹ In addition to excluding hearsay, we "construed narrowly any doubtful, ambiguous, or equivocal evidence."⁷² Yet we made no claim that our methodology was foolproof or our powers of inference divinely inspired; "[f]inding a fact," says the Amer-

⁶² Moore, *supra* note 2, at 66.

⁶⁴ *Id.*

⁶⁶ *Id.* at 192.

⁶⁸ *Id.* at 189 n.7.

⁶⁹ *Id.* at 190—which is the kind Moore wants.

⁷⁰ REPORT, *supra* note 1, at 19.

⁷² *Id.* at 18.

⁶³ Reply, *supra* note 3, at 191.

⁶⁵ *Id.* at 191–92.

⁶⁷ *Id.* at 188–89.

⁷¹ *Id.* at 22.

ican Law Institute's Model Code of Evidence, means merely "determining that its existence is more probable than its non-existence,"⁷³ and that is all we tried to do.

Our findings accurately described probative evidence we encountered: "Substantial credible evidence exists that Contra violence is . . . directed with some frequency at individuals who have no apparent economic, military, or political significance and against persons who are hors de combat."⁷⁴ We cast our conclusions in terms of a preponderance of the evidence: "given the number of persons interviewed, the variety of sites at which the interviews took place, the multiplicity of contacts by which we identified witnesses, and the cross-checking that was on occasion feasible, *the preponderance of the evidence indicates that the Contras are committing serious abuses against civilians.*"⁷⁵

Concerning the Brody report, our conclusion states only probability and makes no claim whatsoever concerning numbers: "Based on our random sampling of these affidavits, and the other samplings performed by Americas Watch and others, the probability is that other of the affidavits relied on by Mr. Brody are also probative."⁷⁶

We spoke only of "prima facie" validity: "In the absence of any showing to the contrary, the evidence now extant of grievous Contra violations of the rights of protected persons under international law must be presumed prima facie valid."⁷⁷ And, far from implying that the matter was free from doubt, we assiduously avoided claims of finality or categorical conclusions. Rather, we suggested only that the burden of persuasion had shifted:

The burden of persuasion has effectively shifted to those who assert that the Contras have conducted themselves in a manner that permits the support of the United States. Unless it can be established that the Contras do not engage in . . . acts of illegal terroristic violence, regardless of any other considerations, further support by the United States is indefensible.⁷⁸

None of this, of course, is mentioned by Moore; it just does not fit into the picture he tries to paint.

III.

Fox and I concluded our report with the following thought:

We believe that it should be possible to forge a policy that seeks to . . . discriminate between a Catholic peasant who admires the United States and a Marxist bureaucrat who does not, a policy precisely calibrated to safeguard legitimate American interests without trampling ground on which the United States need not walk. Many vexing questions face the policy-maker who undertakes such a task. The objective may be unattainable. The enterprise may be fraught with false starts. Mid-course corrections may be required. But there is one initiative that clearly should be eliminated from any such process, and that is a renewal of United States military assistance to the Contras.⁷⁹

⁷³ MODEL CODE OF EVIDENCE Rule 1(5) (1942).

⁷⁴ REPORT, *supra* note 1, at 15.

⁷⁶ *Id.*

⁷⁸ *Id.*

⁷⁵ *Id.* at 22 (emphasis in original).

⁷⁷ *Id.* at 23.

⁷⁹ *Id.* at 28.

Since our report was written, the United States, sadly, has renewed aid to the contras. Our Government is now indifferent not only to the rights of Nicaraguan peasants, but also to the Judgment of the International Court of Justice and to the U.S. treaty obligation to comply with that Judgment.⁸⁰

A national dialogue on these issues is desperately needed—a dialogue that focuses on the *issues*, not on diversionary insinuations, innuendo and aspersions directed at the motives and integrity of participants in that dialogue.

The issues demand discussion because the United States holds itself up as a nation that respects human rights. It has long sought to occupy the high ground in condemning states that support terrorism to further their national interests. This nation's standing to condemn state-sponsored terrorism is undermined if the only difference is that the condemned are not *our* terrorists. Human rights concerns, to be credible, must be reciprocal, applying with equal force to those we support as well as those we oppose.

International law and human rights aside, these issues warrant discussion purely for reasons of benevolent self-interest. Like most other policies, support for the contras involves costs. The U.S. national interest is ill-served if those costs are concealed. Even if the supporters of aid to the contras succeed in channeling the discussion away from issues of international law—as they have to date—they must still demonstrate that the benefits of that policy outweigh the costs. They must succeed with a war-is-hell argument—one made, thus far, mostly behind closed doors, for the reason that it views intentional terror directed at Nicaraguan civilians as a means necessarily pursued in the process of overthrowing the Nicaraguan Government.

I think they cannot sell such a policy, involving as it does the repudiation of cherished principles at the heart of this nation's self-image. But I should dearly like to see them *try* to drop the tactics of deflection, to debate contra terrorism on its merits, to *try* to sell the real policy they support.

Then, I submit, the American people would genuinely have an opportunity to find the "[t]ruth [that is] of particular importance in a politically sensitive ongoing war."⁸¹

MICHAEL J. GLENNON

⁸⁰ UN CHARTER art. 94, para. 1.

⁸¹ Reply, *supra* note 3, at 193.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

TRUST TERRITORIES

(U.S. *Digest*, Ch. 2, §6)

Trust Territory of the Pacific Islands

By Proclamation No. 5564, dated November 3, 1986, President Reagan placed into full force and effect the Covenant with the Commonwealth of the Northern Mariana Islands, concluded by the United States and the Marianas Political Status Commission on February 15, 1975, and approved by Congress on March 24, 1976.¹ In that proclamation, the President also announced the entry into force of the Compact of Free Association, concluded by the United States with the Federated States of Micronesia on October 1, 1982, and with the Republic of the Marshall Islands on June 25, 1983; the Compact had been approved by Congress on January 14, 1986.²

Section 1 of the proclamation set out the President's determination that the Trusteeship Agreement for the Pacific Islands³ is no longer in effect, as of October 21, 1986, with respect to the Republic of the Marshall Islands, and as of November 3, 1986, with respect to the Federated States of Micronesia and the Northern Mariana Islands. This declaration constituted the presidential determination that the trusteeship has been terminated, referred to in section 1002 of the Covenant.

Section 2(a) provided for the following sections of the Covenant to become effective as of 12:01 A.M., November 4, 1986, Northern Mariana Islands local time:

(1) section 101 (which declares that the Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the Commonwealth of the Northern Mariana Islands, in political union with and under the sovereignty of the United States of America);

(2) section 104 (under which the United States has complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands);

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¹ Pub. L. No. 94-241, 90 Stat. 263 (1976). ² Pub. L. No. 99-239, 99 Stat. 1770 (1986).

³ Trusteeship Agreement for the Former Japanese Mandated Islands, approved by the UN Security Council Apr. 2, 1947, and by the United States July 18, 1947, 61 Stat. 3301, TIAS No. 1665, 8 UNTS-189.

(3) sections 301 through 303 (which contain requirements for conferral of U.S. citizenship or nationality on Trust Territory citizens or domiciliaries, the last section declaring all persons born in the Commonwealth on or after its effective date and subject to United States jurisdiction to be U.S. citizens at birth);

(4) section 506 (which provides for the applicability to the Northern Mariana Islands of certain provisions of the Immigration and Nationality Act, notwithstanding the general exclusion of U.S. immigration and naturalization laws from such applicability, set out in section 503(a));

(5) section 806 (which sets out requirements to be observed by the United States in acquiring for public purposes interests in real property other than that transferred to it under the Covenant); and

(6) section 904 (which requires the United States, *inter alia*, to consider the views of the Government of the Northern Mariana Islands in international matters directly affecting the Northern Marianas and to provide opportunities for the effective presentation of those views, to no less extent than such opportunities are provided to any other territory or possession under comparable circumstances. Under section 904(b) the United States is committed to "assist and facilitate the establishment by the Northern Mariana Islands of offices in the United States and abroad to promote local tourism and other economic or cultural interests of the Northern Mariana Islands." Under section 904(c) the Northern Marianas may, on its request, participate in regional and other international organizations concerned with social, economic, educational, scientific, technical and cultural matters, when similar participation is authorized for any other United States territory or possession under comparable circumstances).

Section 2(b) of Proclamation No. 5564 declared the full establishment of the Commonwealth of the Northern Mariana Islands in political union with and under the sovereignty of the United States of America (as of 12:01 A.M., November 4, 1986, Northern Mariana Islands local time), and section 2(c) declared Northern Mariana Islands domiciliaries to be U.S. citizens as of the same date, to the extent provided for in sections 301 through 303 of the Covenant.

Section 3(a) declared that the Compact of Free Association with the Republic of the Marshall Islands is in full force and effect as of October 21, 1986, and the Compact of Free Association with the Federated States of Micronesia is in full force and effect as of November 3, 1986. (Each Government has full control of its respective internal affairs, as well as the ability to conduct foreign affairs including the ability to join regional international organizations, subject to the full authority of the United States in security and defense matters relating to the Freely Associated States.)

The introductory portion of Proclamation No. 5564 summarized events leading to the entry into force of the Commonwealth Covenant and the respective Compacts, in part as follows:

Pursuant to Sections 111 and 121 of the Compacts, the Federated States of Micronesia and the Republic of the Marshall Islands become self-governing and have the right to conduct foreign affairs in their

own name and right upon the effective date of their respective Compacts. Each Compact comes into effect upon (1) mutual agreement between the Government of the United States, acting in fulfillment of its responsibilities as Administering Authority of the Trust Territory of the Pacific Islands, and the other Government; (2) the approval of the Compact by the two Governments, in accordance with their constitutional processes; and (3) the conduct of a plebiscite in that jurisdiction. In the Federated States of Micronesia, the Compact has been approved by the Government in accordance with its constitutional processes, and in a United Nations-observed plebiscite on June 21, 1983, a sovereign act of self-determination. In the Marshall Islands, the Compact has been approved by the Government in accordance with its constitutional processes, and in a United Nations-observed plebiscite on September 7, 1983, a sovereign act of self-determination. In the United States the Compacts have been approved by Public Law 99-239 of January 14, 1986, 99 Stat. 1770.

On May 28, 1986, the Trusteeship Council of the United Nations concluded that the Government of the United States had satisfactorily discharged its obligations as the Administering Authority under the terms of the Trusteeship Agreement and that the people of the Northern Mariana Islands, the Federated States of Micronesia, and the Republic of the Marshall Islands had freely exercised their right to self-determination, and considered that it was appropriate for that Agreement to be terminated. The Council asked the United States to consult with the governments concerned to agree on a date for entry into force of their respective new status agreements.

On October 15, 1986, the Government of the United States and the Government of the Republic of the Marshall Islands agreed, pursuant to Section 411 of the Compact of Free Association, that as between the United States and the Republic of the Marshall Islands, the effective date of the Compact shall be October 21, 1986.

On October 24, 1986, the Government of the United States and the Government of the Federated States of Micronesia agreed, pursuant to Section 411 of the Compact of Free Association, that as between the United States and the Federated States of Micronesia, the effective date of the Compact shall be November 3, 1986.

On October 24, 1986, the United States advised the Secretary General of the United Nations that, as a consequence of consultations held between the United States Government and the Government of the Marshall Islands, agreement had been reached that the Compact of Free Association with the Marshall Islands entered fully into force on October 21, 1986. The United States further advised the Secretary General that, as a result of consultations with their governments, agreement had been reached that the Compact of Free Association with the Federated States of Micronesia and the Covenant with the Commonwealth of the Northern Mariana Islands would enter into force on November 3, 1986.⁴

⁴ See UN Doc. S/18424 (1986).

As of this day, November 3, 1986, the United States has fulfilled its obligations under the Trusteeship Agreement with respect to the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, and the Federated States of Micronesia, and they are self-governing and no longer subject to the Trusteeship. In taking these actions, the United States is implementing the freely expressed wishes of the peoples of the Northern Mariana Islands, the Federated States of Micronesia, and the Marshall Islands.⁵

On January 10, 1986, the United States had also concluded a Compact of Free Association with the Republic of Palau, which would establish a relationship similar to those with the Federated States of Micronesia and the Marshall Islands.⁶ Because the United States had agreed in the Compact not to store nuclear weapons in Palau, the two Governments believed that the Compact did not require approval by 75 percent of the voters, as mandated by the Palau Constitution (which had become effective on January 1, 1980). Article II, section 3 of the Palau Constitution requires such approval in a referendum on any agreement authorizing the use, testing, storage or disposal of nuclear, toxic chemical, gas or biological weapons intended for use in warfare. On September 16, 1986, the appellate division of the Palau Supreme Court held, however, that 75 percent approval was required, even for the transit of nuclear-powered or armed vessels and aircraft through Palauan waters and airspace.

On October 16, 1986, the U.S. Congress completed action on H.J. Resolution 626, approving the Compact of Free Association with Palau, which President Reagan signed on November 14, 1986, as Public Law No. 99-658.⁷ However, a referendum—a UN-observed plebiscite—held in Palau on December 2, 1986, in which 66 percent of the voters approved the Compact, fell short of the three-fourths requirement. Earlier referendums on the Compact had received approvals by 72, 67 and 62 percent of Palauan voters.

President Reagan pointed out in Proclamation No. 5564 that until the Compact approval process was completed in Palau, the United States would continue to discharge its responsibilities in Palau as Administering Authority under the Trusteeship Agreement.

STATE REPRESENTATION

(U.S. *Digest*, Ch. 4, §2)

Recognition of Consular Status

In a circular note dated November 5, 1986, Secretary of State George P. Shultz informed the Chiefs of Mission at Washington that, in the interest

⁵ 51 Fed. Reg. 40,399-400 (1986).

⁶ UN Trusteeship Council Resolution No. 2183 (LIII) of May 28, 1986, which stated, *inter alia*, that the United States had satisfactorily discharged its obligations under the Trusteeship Agreement and that it was appropriate for that Agreement to be terminated upon the entry into force of the Compacts of Free Association and the Covenant with the Northern Mariana Islands, also applied to Palau.

⁷ 100 Stat. 3672 (1986).

of simplifying and expediting the procedure for consular recognition, the United States Government would no longer require the exchange of diplomatic notes, beginning with requests dated December 1, 1986.¹ Thereafter, submissions by embassies of Department of State Forms 394 ("Notice of Foreign Government-Related Employment Status") would be considered formal notification of the appointment of career consular officers.

The note, which also summarized general U.S. government policy regarding consular recognition, set out procedures to be observed in requesting such recognition (and in notifying termination of consular assignments). The major portion follows:

Career Consular Officers

Two copies of Form DS-394, Notification of Foreign Government-Related Employment Status, duly completed, signed and stamped with the Embassy's seal, should be submitted to the Office of Protocol for each request for recognition. In response, the Department will issue a letter advising whether a candidate has been recognized. The date of the acceptance letter will be the effective date of official recognition.

Incomplete Forms DS-394 will be returned to the Missions for correction.

The Department also wishes to take this opportunity to set forth the general policy of the United States Government regarding consular recognition so that it may be uniformly a matter of record.

In order to be eligible for recognition as a career consular officer, an individual must:

- (1) possess a consular title recognized by the United States Government, i.e., Consul General, Deputy Consul General, Consul, Deputy Consul, Vice Consul, or Consular Agent;
- (2) be the holder of an A-1 non-immigrant visa;
- (3) devote his or her official activities to consular duties on an essentially full-time basis;
- (4) not engage in any professional or commercial activity in the receiving State for personal profit;
- (5) reside in the area where recognition is requested;
- (6) be over 21 years of age;
- (7) be a national of the sending State; and
- (8) perform consular duties at a location approved by the Department of State.

Honorary Consular Officers

In connection with requests for recognition for honorary consular officers, a letter describing the duties which the proposed honorary

¹ Beginning on July 13, 1971, the United States ceased issuing exequaturs bearing the signature of the President or certificates of recognition signed by the Secretary of State. From July 13, 1971 through November 30, 1986, consular recognition was accomplished by exequatur in the form of a diplomatic note. See Secretary of State to Chiefs of Mission in Washington, circular note, July 13, 1971, Dept. of State File POL 17-1, Foreign Circular. For United States practice prior to July 13, 1971, see 7 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 539-40 (1970).

consular officer would perform and whether these duties would be performed on a full-time or part-time basis should be submitted to the Department in place of a diplomatic note. If it is the desire of the sending government to appoint an honorary consular officer to a career consular post, the letter should set forth the guidelines or standards followed by the Government in making this determination.

Two copies of Form DS-394, Notification of Foreign Government-Related Employment Status, duly completed, signed and stamped with the Embassy's seal, should be submitted to the Office of Protocol with the accompanying letter. In response, the Department will issue a letter advising whether a candidate has been recognized. The date of the acceptance letter will be the effective date of official recognition.

In order to be eligible for recognition as an honorary consular officer, an individual must:

- (1) possess a consular title recognized by the United States Government;
- (2) be a citizen or legal permanent resident of the United States;
- (3) not hold an office of profit or trust with the United States Government or a position with a state, county or other municipality of the United States which is considered by [it] to be incompatible with the duties of a foreign consular officer;
- (4) if he or she holds a commission as a Reserve Officer in any branch of the United States Armed Forces, obtain permission from the Secretary of the Department concerned;
- (5) reside in the area where recognition is requested; and
- (6) be over 21 years of age.

The Department also should be notified by letter of:

- (1) the proposed establishment of a consular post, its justification, classification, and consular jurisdiction;
- (2) proposed subsequent changes in the seat of a consular post, its classification or its consular jurisdiction; and
- (3) promotions of consular officers in the United States.

Consular officers cannot be recognized until the sending State has formally established a consular office in accordance with the procedure set forth in the referenced note of February 27, 1985.² Consular activities may not be performed before recognition has been granted by the Office of Protocol, Department of State.

The Department should be notified without delay on Form DS-394A, prepared in duplicate, of all terminations of assignments of consular personnel. Consular identification cards issued by the Department of State should be returned with Forms DS-394A to the Office of Protocol. Sales tax exemption cards, automobile license plates and vehicle registrations should be returned to the Office of Foreign Missions.³

² For the Secretary's circular note of Feb. 27, 1985, regarding establishment of consular posts, recognition of consular officers and continuation of existing consular posts, particularly those headed by honorary consular officers, see 79 AJIL 1051-53 (1985).

³ Dept. of State File No. P87 0003-2297.

JUDICIAL DECISIONS

MONROE LEIGH

International land boundary delimitation—principle of uti possidetis—distinction between determination of a land boundary and delimitation of continental shelf

CASE CONCERNING THE FRONTIER DISPUTE (BURKINA FASO/REPUBLIC OF MALI). 1986 ICJ Rep. 554.

International Court of Justice, December 22, 1986.

Pursuant to a Special Agreement, the Republic of Upper Volta (now Burkina Faso) and the Republic of Mali submitted a dispute concerning a part of their common frontier to a special Chamber of the International Court of Justice.¹ The Court *held*: that in accordance with the traditional principle of Spanish-American law, *uti possidetis*, the boundary in the disputed area was to coincide with the delimitation of the former French colonies as of the end of the colonial period.

Before acceding to independence in 1960, the present territories of Burkina Faso and Mali were part of French West Africa. The colonial Government began the process of fixing and identifying the boundaries of the respective colonies pursuant to French colonial law (*droit d'outre-mer*). Burkina Faso and Mali continued the delimitation and completed it successfully with respect to two-thirds of their common frontier of approximately 1,300 kilometers, but were unable to settle their claims with respect to a strip of land (including a major temporary watercourse) stretching about 300 kilometers west from the point where their borderline meets the frontier of Niger. The dispute has erupted into armed conflict on several occasions.² Following appeals for conciliation by heads of several African states and the Organization of African Unity, a mediation commission was set up in early 1975 (the OAU Mediation Commission). The implementation of its recommendations was frustrated, however, when Mali refused to authorize

¹ At the request of the parties, particular cases may be heard by a special Chamber, whose judgment is "considered as rendered by the Court." Statute of the International Court of Justice, Arts. 26, 27, 59 Stat. 1055 (1945), TS No. 993 [hereinafter cited as the Statute]. With the approval of the parties, the Court for this case constituted a special Chamber composed of five judges, two of whom were judges *ad hoc* chosen by each of the parties pursuant to Article 31 of the Statute. Unlike the parties to the *Gulf of Maine* dispute, the parties in this case left it to the Court to choose the members of the special Chamber. See *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 ICJ REP. 246 (Judgment of Oct. 12).

² While the case was pending before the Court, hostilities broke out anew. The Court indicated, in a provisional measures order, that the parties should withdraw armed forces to a mutually agreeable point or, in the absence of such an agreement, to a point to be designated by the Court. *Frontier Dispute (Burkina Faso/Mali)* (Provisional Measures), 1986 ICJ REP. 3 (Order of Jan. 10). The parties subsequently agreed to "withdraw all their armed forces from either side of the disputed area and to effect their return to their respective territories." 1986 ICJ REP. 554, 559, para. 10.

reconnaissance overflights that would have allowed a systematic survey of the disputed area. The matter did not advance any further until 1983 when the two states agreed to submit the dispute to the International Court of Justice.

In light of an express statement in the Special Agreement that the parties desired settlement of the dispute "based in particular on respect of the principle of the intangibility of frontiers inherited from colonization,"³ the Court found that it could not disregard the principle of *uti possidetis*, which the Court applied for the purpose of "securing respect for the territorial boundaries [as they exist] at the moment when independence is achieved."⁴ In dictum, the Court further elaborated that the principle of *uti possidetis*, despite its regional origins, has developed into a general concept of contemporary international customary law, "logically connected with the phenomenon of the obtaining of independence, wherever it occurs."⁵ According to the Court, the principle was not affected by the emergence of a conflicting concept, the right of peoples to self-determination: the principle of *uti possidetis* continued to be applied, particularly in the African context, "to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power."⁶

With respect to the applicable law, the Court stated that it was called upon to settle the dispute "in accordance with international law" since the parties had not authorized it to decide the case *ex aequo et bono*.⁷ The Court observed, however, that "it will have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes."⁸ For example, the Court resorted to equity as justification for dividing a frontier pool in two equal halves where the evidence submitted to it lacked any indication of the historic course of the borderline. Furthermore, because the disputed boundary used to be an administrative border within French West Africa, the Court deemed it necessary to take applicable French law into consideration, cautioning, however, that the colonial legal system "may play a role not in itself . . . but only as one factual element among others, or as evidence indicative of what has been called the 'colonial heritage'."⁹

³ Special Agreement for the Submission to a Chamber of the International Court of Justice of a Frontier Dispute, Sept. 16, 1983, Mali–Upper Volta (now Burkina Faso), preamble, reprinted in 22 ILM 1252, 1253 (1983); see also 1986 ICJ REP. at 557, para. 2.

⁴ 1986 ICJ REP. at 556, para. 23. The Court also noted that the principle, when it first appeared in the process of decolonization of Spanish America in the early 19th century, was also designed for a second purpose, namely, to assert that there was no territory without a sovereign in order to fend off any claims of other colonial powers. See also Separate Opinion of Judge Abi-Saab, *id.* at 659, 661, para. 13 (Abi-Saab, J. *ad hoc*).

⁵ 1986 ICJ REP. at 565, para. 20.

⁶ *Id.*

⁷ Statute, *supra* note 1, Art. 38.

⁸ 1986 ICJ REP. at 567, para. 28 (relying on Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1982 ICJ REP. 18 (Judgment of Feb. 24); Fisheries Jurisdiction (UK v. Ice.; FRG v. Ice.), 1974 ICJ REP. 3 and 175 (Judgments of July 25)).

⁹ 1986 ICJ REP. at 568, para. 30.

The Court then disposed of several other preliminary issues raised by the parties. Mali contended that the Court could not determine the point where the disputed borderline met the frontier of Niger without the latter's agreement. The Court disagreed and held that such a determination did not interfere with Niger's sovereignty; only if the Court purported to fix a tri-point with binding effect on the third state would it transgress its jurisdiction. The Court distinguished the determination of a land boundary from the delimitation of the continental shelf. In the latter case, a court may have to decline jurisdiction if the litigation does not include all states whose interests have to be taken into consideration under international law,¹⁰ whereas no comparable requirement exists with respect to land boundaries. The Court also pointed out that in the absence of a countervailing legal consideration it had a duty under its Statute to resolve the entire dispute submitted to it.¹¹

Burkina Faso advanced the argument that Mali had acquiesced in the proposals submitted by the OAU Mediation Commission. Conceding that the commission did not complete its work and had no authority to make a legally binding decision, Burkina Faso argued that (1) Mali was bound by a statement made by its head of state during an interview that Mali would comply with whatever decision the OAU Mediation Commission might render, and (2) Mali had acquiesced in certain legal principles that were considered applicable in the course of the mediation because Mali participated in the adoption of a commission communiqué stating that Mali and Burkina Faso would settle their dispute on the basis of the commission's recommendations. With respect to the first argument, the Court observed that nothing in the statement of Mali's head of state indicated that there was an intention on Mali's part to create a legal obligation by way of a unilateral act. Whereas a unilateral declaration may be an adequate vehicle to express such intention under certain circumstances (as in the *Nuclear Tests Cases*, where the Court found that the French Government was communicating with the world at large and not with individual addressees¹²), the Court found that in the case of a bilateral dispute a more traditional way would have been chosen had it been intended to create a legal obligation. The Court also rejected Burkina Faso's second acquiescence argument on the ground that the Court had to satisfy itself of the applicability of international law irrespective of any one party's legal position.

Then the Court proceeded to scrutinize the evidentiary value of the regulatory texts, related administrative communications and documents, and cartographic material supplied by the parties. While acknowledging that in recent case law, courts have relied to an increasing extent on maps, the

¹⁰ See *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, 1985 ICJ REP. 13 (Judgment of June 3); *North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.)*, 1969 ICJ REP. 3 (Judgment of Feb. 20).

¹¹ Here the Court relied on *Continental Shelf*, 1985 ICJ REP. 13; *Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)*, 1974 ICJ REP. 253 and 457 (Judgments of Dec. 20); *Northern Cameroons (Preliminary Objections) (Cameroon v. UK)*, 1963 ICJ REP. 15 (Judgment of Dec. 2).

¹² *Nuclear Tests*, 1974 ICJ REP. 253 and 457.

Court treated them with great caution and only as extrinsic and corroborative evidence, in particular with respect to "[i]nformation derived from human intervention, such as the name of places and of geographical features (the toponymy) and the depiction of frontiers and other political boundaries."¹³ After a detailed analysis of the material and heavily relying upon colonial regulatory texts and related *travaux préparatoires*, the Court ultimately fixed a frontier line to be demarcated by the parties with the assistance of three experts, whom the Court agreed to nominate after consultations with the parties.

In separate opinions, the judges *ad hoc* expressed general agreement with the reasoning of the Court but noted additional considerations. Judge *ad hoc* Luchaire would have paid more attention to the conduct and practice of the parties subsequent to achieving independence in order to ascertain whether they have acquiesced in certain factual situations or are estopped from advancing certain legal arguments. Judge *ad hoc* Abi-Saab cautioned that the principle of *uti possidetis* may "operate as a mere fiction that jars with reality"¹⁴ if the colonial boundary had been only loosely defined and a court mechanically drew a line based on a limited number of defined historic points of reference without due regard to equitable considerations.

In this case, the Court adopted a conservative approach to resolve a dispute over facts and the evidentiary value of documents and maps that had led to a serious conflict between two neighboring states. The decision adds refinement to the Court's recent case law; generally, the logic of its reasoning is straightforward yet legalistic.¹⁵ While the Court apparently resolved the bilateral dispute—both Mali and Burkina Faso have welcomed the decision and indicated their willingness to accept it as final and binding¹⁶—it remains to be seen whether it also helped to reestablish confidence in the role of the International Court of Justice in the peaceful settlement of international disputes.

It is worth noting that this is the second recent case in which the parties have submitted a boundary dispute to a special Chamber of the Court; in each case the parties have accepted the special Chamber's judgment. It may well be that the submission of disputes to Chambers of the Court will prove to be politically less controversial and therefore more acceptable for states than an unqualified recognition of the jurisdiction of the full Court.

¹³ 1986 ICJ REP. at 582–83, para. 55.

¹⁴ *Id.* at 662, para. 14 (Abi-Saab, J. *ad hoc*, sep. op.).

¹⁵ Judge *ad hoc* Abi-Saab would have preferred a solution "more deeply impregnated with considerations of equity *infra legem* in the interpretation and application of law, given that the region concerned is a nomadic one, subject to drought, so that access to water is vital." *Id.* at 633, para. 17.

¹⁶ See Messages from the President of Burkina Faso and the President of Mali to the President of the International Court of Justice, dated respectively Dec. 24, 1986 and Jan. 10, 1987, ICJ Communiqué No. 87/1, Jan. 16, 1987.

Federal jurisdiction—forum non conveniens—review of conditions of dismissal imposed by trial court—no need to require consent to enforceability of foreign judgment—equal access of parties to evidence under applicable discovery rules

IN RE UNION CARBIDE CORP. GAS PLANT DISASTER AT BHOPAL, INDIA IN DECEMBER 1984. Nos. 86-7517, 86-7589, 86-7637.

U.S. Court of Appeals, 2d Cir., January 14, 1987.

Appellants, several Indian plaintiffs in consolidated proceedings against Union Carbide Corporation, a New York corporation, appealed from a district court order dismissing the action on grounds of *forum non conveniens*. The claims arose from a large-scale industrial accident that occurred in December 1984 at a chemical plant operated by a subsidiary of Union Carbide in Bhopal, India. In June 1986, the District Court for the Southern District of New York granted Union Carbide's motion to dismiss and entered its order after Union Carbide, while expressly reserving its right to appeal, agreed to certain conditions.¹ The U.S. Court of Appeals for the Second Circuit (per Mansfield, J.) eliminated two of the conditions imposed by the trial court, affirmed the order as modified, and *held*: that the court below had not abused its discretion in dismissing the action.

In its review of the decision below, the appellate court relied on the standard set forth by the U.S. Supreme Court in *Piper Aircraft Co. v. Reymo*,² a seminal *forum non conveniens* decision that had also provided the framework for the trial court's analysis. The appellate court found that the trial court had reasonably considered and balanced all applicable factors and that under the given circumstances it would have been an abuse of discretion had the case not been dismissed. In particular, the appellate court rejected appellants' contentions that the trial court should have paid more deference to the plaintiffs' choice of forum and appellants' ongoing settlement negotiations with Union Carbide. According to the court, such deference would have been especially unwarranted because the Indian Government, representing all but a few Indian plaintiffs, had ultimately decided to support the *forum non conveniens* dismissal and because it opposed as inadequate a \$350 million settlement proposal which American counsel for appellants apparently would have been prepared to accept.³

With respect to the conditions of the dismissal, the appellate court noted that it is not unusual to condition a *forum non conveniens* order on the moving defendant's consent to submit to the jurisdiction of foreign courts and its waiver of any statute of limitations defense in order to ensure that the case could be heard in the more convenient forum. But the appellate court found that it was inappropriate for the trial court to require Union Carbide to

¹ 634 F.Supp. 842 (S.D.N.Y. 1986), summarized in 80 AJIL 964 (1986).

² 454 U.S. 235 (1981).

³ Following the *forum non conveniens* dismissal, the Indian Government, acting on behalf of all Indian claimants pursuant to the Indian Bhopal Gas Leak Disaster (Processing of Claims) Act, Indian Parliament Act No. 21 of 1985, GAZETTE OF INDIA (EXTRAORDINARY), pt. 2, sec. 2, Mar. 29, 1985, had filed suit against Union Carbide and its Indian subsidiary in the District Court of Bhopal, India, in September 1986.

agree to satisfy any final judgment of an Indian court that "comport[s] with the minimal requirements of due process."⁴ The appellate court found that the district court had misread the applicable law when it assumed that an Indian judgment might not be enforceable against Union Carbide in the United States without Union Carbide's consent. In this respect the appellate court referred to New York state law which provides concise rules for the recognition and enforcement of foreign money judgments.⁵ Under these rules, a foreign judgment would not be enforced if, among other clearly defined instances in which courts could decline enforcement, it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."⁶ While the district court might have intended to incorporate this concept in its order, the appellate court pointed out that the language used in the order may give rise to misunderstandings; in particular, the reference to "the minimum requirements of due process"⁷ could be understood to lower the otherwise applicable statutory standard. For these reasons the appellate court decided to delete the condition in its entirety.

The court also addressed the argument (which it attributed to counsel for Union Carbide) that the due process language of the district court order suggested that U.S. courts could retain jurisdiction "to monitor the Indian court proceedings" and be "on call to rectify" any infringement of Union Carbide's due process rights.⁸ It emphatically rejected the concept of parallel jurisdiction of courts in several countries: "[Such a proposition] is not only impractical but evidences an abysmal ignorance of basic jurisdictional principles, so much so that it borders on the frivolous."⁹ It reasoned that a court relinquished its jurisdiction when it granted dismissal for *forum non conveniens*. A party alleging shortcomings of the proceedings before a foreign court could raise them in a U.S. court only if and when enforcement of a resulting foreign judgment is sought against it in the United States.

Finally, the court deleted the condition requiring Union Carbide to provide discovery to the Indian Government pursuant to the U.S. Federal Rules of Civil Procedure even though no corresponding duty existed on the part of the Indian Government. While noting that in some instances it may be

⁴ 634 F.Supp. at 867.

⁵ See N.Y. Civ. Prac. Law §§5301-5309 (McKinney 1978). The New York statute is based on the Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 263 (1986).

⁶ N.Y. Civ. Prac. Law §5304(a)(1) (McKinney 1978).

⁷ See text at note 4 *supra*.

⁸ Nos. 86-7517, -7589, -7637, slip op. at 9. The appellate court indicated that Union Carbide seemed particularly disturbed by a temporary order that froze all of its assets and thus seriously affected Union Carbide's operations worldwide. The Bhopal district court had issued the order shortly before oral argument in the U.S. proceedings. (This issue was redressed in November 1986 when Union Carbide agreed to establish a \$3.1 billion unencumbered asset pool to ensure payment of any judgment rendered against it. The Indian Government recently disputed Union Carbide's implementation of the November 1986 agreement.) Counsel for Union Carbide is reported, however, to have denied having intended any request for supervision, contrary to the attribution by the court. 9 Nat'l L.J., Feb. 2, 1987, at 8, col. 1.

⁹ Slip op. at 10.

appropriate to require only one party to provide discovery, e.g., if such party unqualifiedly consented or if the other party were believed to have no relevant discoverable material, the court held that "[b]asic justice dictates that both sides be treated equally, with each having equal access to the evidence in the possession or under the control of the other."¹⁰

By deleting two of the conditions of dismissal, the court of appeals cured the few troubling aspects of the otherwise well-reasoned district court opinion. The *Union Carbide* case is a convincing example of the exercise of judicial restraint on the part of U.S. courts in application of the time-honored doctrine of *forum non conveniens*.

Federal jurisdiction—act of state doctrine—sovereign immunity

REPUBLIC OF THE PHILIPPINES v. MARCOS. 806 F.2d 344.
U.S. Court of Appeals, 2d Cir., November 26, 1986.

Appellants, individuals and corporations holding title to certain New York property allegedly beneficially owned by the former President of the Philippines, sought review of a preliminary injunction prohibiting the sale or transfer of said property pending final determination of its ownership. The United States Court of Appeals for the Second Circuit (per Oakes, J.) affirmed and *held*: that the action arose under the federal common law of foreign relations; that the suit was justiciable, and that appellants' defenses based on the act of state and sovereign immunity doctrines lacked merit.¹

This case arose out of the current Philippine Government's efforts to recover assets that Ferdinand Marcos had allegedly embezzled from the Philippine Government during his tenure as President. Shortly after taking power, the new Philippine Government established the Presidential Commission for Good Government, which was directed to retrieve all property found to have been embezzled by Marcos. Pursuant to this directive, appellee sought to enjoin the sale or transfer of five New York properties allegedly purchased for Marcos with funds stolen from the Philippine Government. Subsequent to the initiation of this suit, the Philippine Government declared a provisional freeze on Marcos's assets and requested that foreign governments honor the freeze to preserve the new Government's ability to recover embezzled property. The district court granted appellee's request for an injunction and appointed a receiver to administer the properties pending resolution of the case.

¹⁰ *Id.* Because the Indian Government was sued for alleged failure to exercise adequate supervision of the operation of the Union Carbide plant in other actions pending before the Bhopal district court, the appellate court perceived the possibility that the Indian Government might become involved on both sides in the Indian proceedings against Union Carbide, which increased the importance of treating the Indian Government and Union Carbide equally.

¹ The court also rejected appellants' argument that the case should be dismissed on grounds of *forum non conveniens*.

Although jurisdiction was not contested by the parties, the court closely reviewed whether federal jurisdiction was proper in what would otherwise be a cause of action for conversion under state law. First, the court relied on several act of state cases discussing the importance of a uniform federal law of foreign relations to "support" the existence of federal jurisdiction in this case. The court noted that the question posed was whether "the federal common law in the area of foreign affairs is so 'powerful,' or important, as to displace a purely state cause of action."² The court concluded that an action by a foreign government against its former head of state probably arises under federal common law "because of the necessary implications of such an action for United States foreign relations."³ The court held that regardless of whether the overall claim is reviewed as one of federal or state common law, federal jurisdiction was present because the claim requires a U.S. court to review a foreign government request to freeze property in the United States. Thus, the court concluded that the claim arose under the federal common law of foreign relations.

Turning to appellants' arguments, the court first concluded that the case was justiciable since it was "[no] more unmanageable . . . than . . . any other case involving theft, misappropriation, corporate veils, and constructive trusts."⁴ The court relied on a statement of interest filed by the Department of Justice, with the concurrence of the State Department's Office of the Legal Adviser, as well as a declaration by a State Department official, to conclude that the executive branch would not fear embarrassment should U.S. courts adjudicate disputes between the current Philippine Government and Marcos.

As to appellants' contention that the act of state doctrine precluded judicial review, the court found that the appellants had failed to discharge their burden of proving the requisite acts of state at this stage of the litigation. The court observed that appellants did not distinguish between Marcos's acts as head of state, which may be protected from judicial scrutiny even if illegal under Philippine law, and his purely private acts. Recognizing that the burden was on the appellants to present evidence demonstrating that such acts were in fact public, the court indicated that the district court should closely scrutinize any additional evidence submitted on the public nature of Marcos's acts.

In dicta, however, the court suggested at least two reasons why the act of state doctrine might be inapplicable even to Marcos's public acts. First, given the separation-of-powers rationale for the act of state doctrine, the fact that Marcos's acts were those of a government no longer in power greatly diminished "the danger of interference with the Executive's conduct of foreign policy."⁵ The court acknowledged that the Second Circuit had previously applied the doctrine to the acts of former governments,⁶ but questioned

² 806 F.2d 344, 354.

³ *Id.*

⁴ *Id.* at 356.

⁵ *Id.* at 359.

⁶ See *Bernstein v. Van Heyghen Freres, S.A.*, 163 F.2d 246 (2d Cir.), *cert. denied* 332 U.S. 772 (1947); *Banco de Espana v. Federal Reserve Bank of New York*, 114 F.2d 438 (2d Cir. 1940).

the continued vitality of those cases in light of the Supreme Court's statement in *Banco Nacional de Cuba v. Sabbatino*,⁷ that "[t]he balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered."⁸ Second, the court noted that to the extent the act of state doctrine reflects respect for foreign states, its application may well be less justified when a foreign state asks U.S. courts to scrutinize its actions.

Turning to appellants' claim that the newly formed Philippine Government was attempting to confiscate Marcos's property in violation of U.S. law, the court stated that no confiscation had yet taken place and that the plaintiffs sought recovery of property illegally taken, not confiscation of property legally owned. Furthermore, according to the court, the claim that future proceedings in the Philippines to recover property would not satisfy due process was not ripe since no confiscatory decrees had been issued and the court had "every reason to believe . . . that any Philippine decree will comport with due process of law as the courts of the United States would envisage it."⁹

Finally, the court concluded that appellants had no standing to assert sovereign immunity as a defense to this action. Even if appellants had standing, the court questioned the appropriateness of applying the doctrine to a former head of state's private acts. The court reasoned, "The rationale underlying sovereign immunity—avoiding embarrassment to our government and showing respect for a foreign state—may well be absent when the individual is no longer head of state and the current government is suing him."¹⁰

The decision of the court of appeals may shift the focus of this dispute back to the Philippines, where the Philippine Government is attempting to compile evidence to demonstrate the allegations of Marcos's unlawful takings. However, since the district court may be required to adjudicate whether Marcos is the owner of the New York properties in question, the proceedings before the district court will continue to be a central focus of efforts to recover allegedly embezzled funds. Whether any subsequent confiscatory action of the Philippine Government will be recognized in the United States is an open question.

Federal jurisdiction—mining in Nicaraguan waters—political question doctrine

CHASER SHIPPING CO. v. UNITED STATES. 649 F.Supp. 736.
U.S. District Court, S.D.N.Y., December 11, 1986.

Plaintiffs, a Norwegian shipping company and its Norwegian subrogee, brought a tort action against the United States under the Suits in Admiralty

⁷ 376 U.S. 398 (1964).

⁸ *Id.* at 428.

⁹ 806 F.2d at 360.

¹⁰ *Id.*

Act (46 U.S.C. §742 (1982)) and the Federal Tort Claims Act (28 U.S.C. §§1346(b), 2671-2680 (1982 & Supp. 1986)) for damages done to the M/T *Iver Chaser* when the ship struck a mine allegedly placed in the harbor of Corinto, Nicaragua by the U.S. Central Intelligence Agency. Plaintiffs alleged that the U.S. Government had violated a duty to innocent third-party vessels by failing to comply with its previously established practice of clearly warning such vessels about the placement of mines. Defendant moved to dismiss the complaint, arguing that the conduct of foreign relations was vested in the executive and legislative branches of government, and that therefore the case presented a nonjusticiable political question. The U.S. District Court for the Southern District of New York (per Tenney, J.) dismissed the complaint and *held*: that the action raised a nonjusticiable political question not appropriate for judicial resolution.

The court began its analysis of the political question doctrine by setting forth the analysis in *Baker v. Carr*,¹ which established that a nonjusticiable political question implicates one or more of the following concerns:

- (1) a textually demonstrable constitutional commitment of the issue in dispute to a coordinate political department;
- (2) a lack of judicially discoverable and manageable standards for resolving the dispute;
- (3) inability to decide the dispute without an initial policy determination of a kind clearly for nonjudicial discretion;
- (4) impossibility for a court to resolve independently the dispute without expressing a lack of respect due to coordinate branches of government;
- (5) the existence of an unusual need for unquestioning adherence to a political decision already made; or
- (6) the likelihood of embarrassment from multifarious pronouncements by various government departments on one question.

Following *Baker v. Carr*, the court carefully scrutinized the facts and found that five of the six concerns noted in *Baker* were raised in this case.²

First, the court observed that the plaintiffs were requesting relief, which would require the court to involve itself in matters committed by the Constitution to another branch of government. While noting that the judiciary is responsible for adjudicating claims of tort liability against the Government, the court disagreed with the plaintiffs' assertions that by asking for damages, rather than a declaration that the government actions were unconstitutional, they were not asking for interference in matters left to another branch of the Government. The court asserted that the Constitution "commits to the

¹ 369 U.S. 186 (1962).

² For the purposes of ruling on defendant's motion to dismiss, the court accepted plaintiffs' allegations that the damages to the *Iver Chaser* were caused by mines placed in the Nicaraguan harbor by the Central Intelligence Agency, with the approval of the President of the United States.

Executive Branch the authority to make foreign policy decisions.”³ Relying on the analysis of a similar tort claim in *In re Korean Air Lines*,⁴ the court found that the form of relief sought—damages rather than an injunction—did not mitigate the separation-of-powers concerns.

The second concern found by the court was the clear lack of judicially discoverable and manageable standards for arriving at the type of tort damages award sought by the plaintiffs. Reviewing plaintiffs’ pleadings, the court observed that it was being asked to determine whether there was an established practice of warning innocent third parties of covert military operations and then whether a breach of that duty would require the Government to provide monetary redress to such third parties. The court noted that inquiries regarding such matters could not be conducted without obtaining classified intelligence information beyond the reach of the plaintiffs.⁵ The court observed that even if the classified information were available, it would be incapable of assessing the underlying military and diplomatic considerations that had resulted in the decision to mine the harbors without warning third-party vessels.

The court reasoned that in adjudicating this action it could not remain within the traditional realm of the judiciary.⁶ For the judiciary to monitor the conduct of covert military operations, before or after their occurrence, would be an exercise of nonjudicial discretion which *Baker* counsels the courts to avoid. The scrutiny of foreign policy matters would also result in a failure by the court to accord appropriate respect to a coordinate branch of government. Finally, the court found that since the United States Government had denied involvement in the covert mining, any judicial inquiry that might prove otherwise could be embarrassing to the Government.⁷

³ 649 F.Supp. 736, 738.

⁴ 597 F.Supp. 613 (D.D.C. 1984) (appeal pending). Following the destruction of Korean Air Lines Flight 007 by the Soviet Union, the plaintiffs filed a suit for damages based on the U.S. Government’s: (1) deployment of military aircraft near Flight 007; (2) failure to track the flight; and (3) failure to warn the crew of the flight’s departure from its proper course. In dismissing the complaint, the court concluded that to “attempt to decide such a matter without the necessary expertise and in the absence of judicially manageable standards would be to entangle the court in matters [military in nature] constitutionally given to the executive branch.” *Id.* at 616.

⁵ The court noted that the classified information would not be provided voluntarily and is clearly exempt from disclosure under the Freedom of Information Act, 5 U.S.C. §552(b)(1)(A) (1982), as secret national defense or foreign policy information.

⁶ The court relied on the Supreme Court decision in *Chicago & South Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948):

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

⁷ The court also determined that it should avoid the acute “danger of foreign citizens’ using the courts in situations such as this to obstruct the foreign policy of our government.” 649 F.Supp. at 740 (quoting *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985)).

This decision adopts the rationale used in such recent cases as *Greenham Women against Cruise Missiles*⁸ and *In re Korean Air Lines*,⁹ in which U.S. courts have refused to entertain suits that would involve them in the political questions and controversies of the day. While the court's assertion that the Constitution commits foreign policy decisions to the executive branch may overstate the authority of the President, it is clear that the judicial branch has little authority over such issues. In order to address plaintiffs' theory of recovery, the court would have had to examine and pass on the manner in which U.S. foreign policy decisions regarding Nicaragua were made. It is probably too early to say whether the principles of judicial abstention applied in these recent cases represent a permanent trend in U.S. case law.

Foreign sovereign immunity—preexisting treaty exception—waiver—commercial activity exception

COLONIAL BANK v. COMPAGNIE GENERALE MARITIME ET FINANCIERE. 645 F.Supp. 1457.

U.S. District Court, S.D.N.Y., October 15, 1986.

Plaintiff, Colonial Bank (Colonial), brought an action against Compagnie Generale Maritime et Financiere (CGMF), a corporation wholly owned by the Republic of France, alleging damages as a result of CGMF's tortious interference with a business relationship. The United States District Court for the Southern District of New York (per Leval, J.) rejected plaintiff's arguments that sovereign immunity had been waived by either the national treatment clause of the 1960 Treaty of Establishment or defendant's conduct and *held*: that defendant was immune from suit under the provisions of the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602-1611 (1982)) (FSIA).

This lawsuit was precipitated by a complicated series of events involving a commercial dispute between two foreign shipping companies. CGMF contracted to sell a vessel to a Belgian corporation, General Maritime Enterprises (GME). GME ultimately refused to honor the contract. To protect itself, CGMF sold the vessel to a Thai corporation, successfully pursued arbitration against GME, and eventually received an award of damages. To secure its claim pending the outcome of the arbitration, CGMF caused the arrest in Le Havre, France, of the *Atlantico*, a Greek-flag vessel that was operated by GME. A Panamanian corporation, Pancarib, contested the arrest, claiming that it was the owner of the *Atlantico*. In fact, Pancarib had purchased the vessel by obtaining a loan from Colonial; the loan was secured by Pancarib's assigning all revenues from the operation of the *Atlantico* to Colonial.

Despite Pancarib's challenge, CGMF brought a series of actions to arrest

⁸ 591 F.Supp. 1332, 1336 (S.D.N.Y. 1984), *summarized in* 79 AJIL 746 (1985), *aff'd*, 755 F.2d 34 (2d Cir. 1985).

⁹ 597 F.Supp. 613 (D.D.C. 1984).

the *Atlantico*, which resulted in delays with and interruption of the vessel's operations. When Pancarib defaulted on its loan obligations, Colonial's only security was the right to receive revenues generated by operation of the *Atlantico*, revenues that had dried up as a result of the arrest actions.

Colonial therefore brought suit against CGMF, both as a mortgagee on the loan and as the assignee of Pancarib's claims. Colonial claimed that CGMF had tortiously interfered with the operation of the *Atlantico*, causing it to lose revenue and thereby diminishing Colonial's security in the loan. CGMF argued it was immune from suit since it was wholly owned by the French Government.

The court initially considered plaintiff's argument that a preexisting treaty between France and the United States rendered the FSIA inapplicable under 28 U.S.C. §1604. The relevant treaty, the Convention of Establishment, Protocol and Declaration, provided: "Nationals and companies of either [country] shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain within the territories of the other [country]," and companies of either country "shall have their juridical status recognized [in the courts of the other country]." ¹ Plaintiff argued that this language removed CGMF's immunity from suit in the United States. In rejecting plaintiff's argument, the court reasoned that this language was "intended to guarantee the rights of nationals and companies of the foreign state, not take them away." ² The court noted that the Convention with France, unlike other U.S. treaties, was silent on the specific issue of sovereign immunity. Therefore, the court concluded that the FSIA's treaty exception to sovereign immunity was inapplicable. ³

Plaintiff also argued that CGMF had implicitly waived its immunity by (1) having the English arbitration award confirmed in U.S. district court, (2) employing a New York law firm for negotiations with Colonial, and (3) pleading the confirmation of the arbitral award as an affirmative defense in the pending lawsuit. According to the court, the legislative history of the FSIA and existing precedent cautioned against a broad application of the implicit waiver exception to sovereign immunity. The court found that although Colonial's lawsuit arose out of CGMF's attempt to collect damages from the operator of the *Atlantico*, CGMF's arbitration and related judicial proceedings were distinct and separate from the pending action. The court believed that the superficial relationship between the two legal proceedings did not provide a basis for finding that defendant had implicitly waived its immunity. The court also rejected plaintiff's contention that CGMF had implicitly waived immunity by incorporating into its answer, as an affirmative defense of set-off, the judgment against GME. Because the judgment was employed only defensively, rather than offensively, the court said, CGMF had not forfeited its assertion of immunity.

Colonial also claimed that the FSIA's "commercial activity" exception to sovereign immunity was applicable, arguing that CGMF conducted com-

¹ Nov. 25, 1959, 11 UST 2398, TIAS No. 4625, 401 UNTS 75, Arts. V, XIV.

² 645 F.Supp. 1457, 1460.

³ *Id.* at 1461.

mercial operations in the United States and, in the alternative, that the loss of the *Atlantico's* revenues due to CGMF's arrest actions caused a direct effect on Colonial in the United States. The court began by reviewing the actions of CGMF and their nexus to the United States. The court noted that CGMF's commercial activity was limited to the acquisition of vessels for bareboat charter to CGMF's subsidiaries. These subsidiaries, not CGMF, operated the vessels calling at U.S. ports. Relying on the interpretation of section 1605(a)(2) of the Court of Appeals for the Second Circuit in *Ministry of Supply, Cairo v. Universe Tankships, Inc.*,⁴ the court concluded: "Far from comprising 'an integral part' of commercial activity in the United States, CGMF's contract to sell the Carbet, the subsequent London arbitration, and the arrests of the *Atlantico*, had no connection to any commercial activity 'having substantial contact with the United States.'"⁵ The court observed that the only act of CGMF that occurred in the United States relating to the instant action was its lawsuit to confirm the English arbitral award against GME. The court found that such judicial recourse did not constitute commercial activity.

The court also rejected plaintiff's claim that CGMF's actions outside the United States had caused a direct effect on Colonial inside the United States. The court noted that had Pancarib possessed sufficient funds, it could have paid its debt obligations to Colonial. According to the court, "CGMF's seizures of the *Atlantico* did not alter Colonial's rights as against Pancarib, which continued to owe periodic mortgage payments."⁶ The court acknowledged that the arrests of the *Atlantico* had interfered with the revenue stream that secured the loan. Focusing on this distinction, however, the court concluded that "CGMF's seizures of the *Atlantico*, although directly affecting the interests of [the vessel] owner [i.e., Pancarib], had but an indirect effect on the mortgagee."⁷

Two aspects of this decision deserve comment. First, the court appears to have narrowly defined the FSIA's implicit waiver exception by finding that defendant's offensive use of a U.S. court to confirm a foreign arbitration award in a closely related matter did not constitute an implicit waiver. Second, and more important, the court held that the national treatment clause in the Treaty of Establishment with France did not amount to a waiver of jurisdiction for purposes of section 1604 of the FSIA. This holding seems clearly correct.

In addition, the court narrowly construed the term "direct effect" as used in section 1605(a)(2) by holding that the diminishment in value of plaintiff's security interest in the *Atlantico* was only an indirect, rather than a direct, effect on plaintiff. This portion of the court's holding is based more on the minimum jurisdictional contacts standards of the FSIA than on strict sovereign immunity considerations. The former are intertwined with the latter in section 1605(a)(2) in a particularly confusing way, which apparently ac-

⁴ 708 F.2d 80, 84 (2d Cir. 1983).

⁶ *Id.* at 1464.

⁵ 645 F.Supp. at 1463-64.

⁷ *Id.* at 1464-65.

counts for this anomalous result in which a suit against a French company that from first to last acted in a nongovernmental capacity, nevertheless is dismissed on sovereign immunity grounds.

DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS

European Human Rights Convention—compensation to nationals following expropriation of property

CASE OF LITHGOW AND OTHERS. 102 Eur. Ct. H.R. (ser. A) (1986).
European Court of Human Rights, July 8, 1986.

The applicants, one British national and nine companies incorporated and registered in the United Kingdom,¹ filed a complaint against the United Kingdom alleging that the nationalization of their property without adequate compensation under the Aircraft and Shipbuilding Industries Act of 1977 (the Act) violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).² The applicants did not challenge the authority of the Government to nationalize property, but rather they alleged that the compensation they had received was grossly inadequate and discriminatory. The European Commission of Human Rights concluded that there had been no breach of the Convention. Under the applicable procedural rules the applicants sought review by the Court. The European Court of Human Rights (*en banc*) reached the same conclusion and *held*: that general principles of international law did not apply to the expropriation by a nation of the property of its nationals and that the property provisions of the Convention had not been breached by the United Kingdom.

As a preliminary matter, the Court rejected the argument that general principles of international law applied in this case. Article 1, paragraph 1 of Protocol No. 1 provides as follows: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." Relying upon the reference to international law, the applicants argued that they were entitled to prompt, adequate and effective compensation for the deprivation of their property. Without addressing the standard of compensation under international law, the Court conceded that "there is some force in the applicants' argument [that international law applied] as a matter of grammatical construction."³ However, the Court rejected the applicants' theory and concluded that international law did not apply. First, the Court observed that "purely as a matter of general international law, the principles

¹ The applicants were Sir William Lithgow; Vosper, Ltd.; The English Electric Company, Ltd.; Vickers, Ltd.; Banstonian Co.; Nathan Shipbuilding & Industrial Holdings, Ltd.; Yarrow PLC; Dowsett Securities, Ltd.; FFI (UK Finance) PLC; The Prudential Assurance Company, Ltd. The Commission consolidated the cases brought by these applicants.

² 213 UNTS 221.

³ Slip op. at 40, para. 114.

in question apply solely to non-nationals.”⁴ Thus, the Court concluded that it is

more natural to take the reference to the general principles of international law in Article 1 of Protocol No. 1 to mean that those principles are incorporated into that Article, but only as regards those acts to which they are normally applicable, that is to say acts of a State in relation to non-nationals.⁵

Responding to the applicants’ argument that this interpretation renders the reference redundant since non-nationals already enjoy the protections of international law, the Court noted two reasons for the inclusion of the reference to international law. First, this provision “enables non-nationals to resort directly to the machinery of the Convention to enforce their rights on the basis of the relevant principles of international law.”⁶ Moreover, the reference prevents any argument that the entry into force of the Protocol vitiated non-nationals’ property rights. Finally, the Court rejected the applicants’ argument that this interpretation resulted in unlawful discrimination between nationals and non-nationals since a state may lawfully distinguish between the two in some matters.

Especially as regards a taking of property effected in the context of a social reform or an economic restructuring, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals⁷

Turning to the norms directly established in the European Convention on Human Rights, the Court acknowledged that Article 1 impliedly required the payment of compensation.⁸ First, the Court observed that the second sentence of paragraph 1 of the article, allowing the taking of property, must be read in the light of the first sentence of that paragraph, stating the right to the peaceful enjoyment of property. Thus, there must “be a reasonable relationship of proportionality between the means employed and the aim sought to be realised,”⁹ or, in other words, a fair balance must be struck between the demands of the community’s general interests and the requirements of the protection of the individual’s fundamental rights. Accordingly,

⁴ *Id.*, para. 113.

⁵ *Id.*, para. 114.

⁶ *Id.*, para. 115.

⁷ *Id.* at 41, para. 116. The Court also noted that the *travaux préparatoires* of the Protocol did not support the applicants’ position. *Id.* at 42, para. 117.

⁸ In a concurring opinion, Judge Vilhjalmsón opined that Article 1 of Protocol No. 1 does not imply a right to compensation.

⁹ *Slip op.* at 42, para. 120.

the Court stated that "the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1."¹⁰ However, the Court also noted that legitimate objectives of "public interest," such as measures of economic and social reform, could call for compensation at less than the full market value. Moreover, the Court observed that the national government should be granted a wide margin of discretion since it is better placed than an international judge to determine what measures are appropriate, given the government's knowledge of the needs and resources of the society in question.

A decision to enact nationalisation legislation will commonly involve consideration of various issues on which opinions within a democratic society may reasonably differ widely. Because of their direct knowledge of their society and its needs and resources, the national authorities are in principle better placed than the international judge to appreciate what measures are appropriate in this area and consequently the margin of appreciation available to them should be a wide one. It would, in the Court's view, be artificial in this respect to divorce the decision as to the compensation terms from the actual decision to nationalise, since the factors influencing the latter will of necessity also influence the former. Accordingly, the Court's power of review in the present case is limited to ascertaining whether the decisions regarding compensation fell outside the United Kingdom's wide margin of appreciation; it will respect the legislature's judgment in this connection unless that judgment was manifestly without reasonable foundation.¹¹

Applying this standard of review to the facts of the case, the Court concluded that the compensation system of the Act did not violate Article 1.¹²

This is the first time the Court has applied Protocol No. 1 to the Convention in the area of the compensation to be paid by a state for nationalizing property of its subjects. Although the Court was divided on many of the issues presented, it did clearly establish that in the area of nationalization it will substantially defer to a government that expropriates its nationals' property. This case should not be read to establish such a deferential standard of review as to nationalization of the property of foreign investors or as derogating from the international law standard.

¹⁰ *Id.* at 43, para. 121. The Court also observed that a state may apply different standards for compensation with respect to nationalization than with respect to other takings of property.

¹¹ *Id.* at 44, para. 122.

¹² The Court also rejected the applicants' assertions of violations of the nondiscrimination norms in Article 14, the due process provision of Article 6, and the effective remedy provision in Article 13.

DECISION OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL

Algiers Accords—treaty interpretation—effect of general principle on obligations of signatories—return of excess funds held by United States

ISLAMIC REPUBLIC OF IRAN v. UNITED STATES OF AMERICA. AWD
63-A-15-(I:G)-FT.

Iran-United States Claims Tribunal, The Hague, August 20, 1986.

Iran brought an interpretive dispute before the Iran-United States Claims Tribunal alleging that, under the Algiers Accords¹ which secured the release of U.S. hostages and the return of Iranian funds, the United States was required to return to Iran an additional amount of approximately \$500 million held in the Federal Reserve Bank of New York. Under the Accords, the United States retained certain Iranian funds in an account (Dollar Account No. 1) in order to repay loans made to Iran by syndicates of U.S. banks. After these loans were paid off, a substantial surplus remained, which Iran sought to recover from the United States. Iran recognized that the Algiers Accords contain no specific provision providing for the transfer of these surplus funds. However, Iran contended that General Principle A of the Accords² provides a general obligation, pursuant to which the United States must return the surplus funds. The United States asserted that General Principle A confers no independent operative obligation and that the only obligations to which the United States is subject are specifically defined by operative paragraphs not including the General Principles. Since Iran could not point to a specific provision requiring the United States to return the excess funds, the United States should not be under an obligation, under the Accords, to do so. The United States conceded, however, that any surplus would ultimately have to be returned to Iran, but contended that the terms of the return should be the subject of negotiation and agreement between the parties separate and apart from any obligations arising under the Accords. The Full Tribunal (Arbitrators Holtzmann, Aldrich and Brower dissenting) found that it had jurisdiction over the dispute and *held*: that General Principle A should be interpreted as containing general operative commitments by the United States that include a general obligation to restore the financial position of Iran, pursuant to which the United States must return the surplus funds to Iran immediately, subject to negotiation and agreement between the parties of the precise sum that should be returned.

The interpretation of General Principle A was relevant both to the Tri-

¹ For background information on the Accords, see 77 AJIL 642 (1983).

² General Principle A of the Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) provides as follows:

Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

For the General Declaration, see 75 AJIL 418 (1981).

bunal's jurisdiction and to the merits of the case. With regard to jurisdiction, the United States contended, *inter alia*, that the Tribunal's jurisdiction is limited to disputes concerning obligations based on specific operative provisions of the Accords. Since there is no specific provision in the Accords requiring the United States to transfer the surplus funds to Iran, it followed that the Tribunal did not have jurisdiction over this dispute. The Tribunal rejected this position and held that it had jurisdiction since the dispute involved a dispute as to the interpretation and performance of General Principle A, and was therefore "a dispute between the parties to the General Declaration 'as to the interpretation or performance of any provision of this Declaration' " within the meaning of the jurisdictional provision of the Accords.³

Turning to the merits of the case, the Tribunal first decided that General Principle A created a general obligation in addition to the specific obligations contained elsewhere in the Accords. In upholding Iran's position, the Tribunal stated that

the General Principles must be understood as embodying broad legal commitments, with the ways of their implementation being detailed in the following parts of the General Declaration.

. . . [T]aken in their ordinary meaning, the terms of General Principle A clearly embody commitments by the United States. . . . The Tribunal is therefore unable to accept the contention of the [United States] that General Principle A is no more than a preamble and contains no operative provisions.⁴

As to the substance of the obligation created by General Principle A, the Tribunal found that the United States had accepted two different kinds of duties. First, "it obliged itself to restore, 'in so far as possible', the financial position of Iran to that which existed prior to 14 November, 1979."⁵ While admitting that this is a "very sweeping statement," the Tribunal also observed that it is qualified by the opening phrase "[w]ithin the framework of and pursuant to the provisions of the two Declarations."⁶ Thus, the specific provisions of the two declarations limit the obligations deriving from the broad commitment defined in General Principle A.

The Tribunal next found that the second sentence of General Principle A, which concerns the mobility and free transfer of Iranian funds within the United States, simply describes in general terms one of the legal consequences ascribed by the parties to the duty to restore the financial position of Iran, the specific actions to be taken being described in detail in paragraphs 4-9 of the General Declaration. The Tribunal held that "[n]othing in this second sentence can, however, be construed as limiting the general commitment to restore the financial position of Iran to the more narrow obligation of ensuring the mobility of the Iranian assets."⁷

Having found that General Principle A contains a general obligation on

³ AWD 63-A-15-(I:G)-FT, slip op. at 8 (quoting General Declaration, *supra* note 2, para. 17).

⁴ Slip op. at 10-11.

⁵ *Id.* at 11.

⁶ *Id.*

⁷ *Id.* at 12.

the United States to restore Iran's financial position and that, accordingly, it would be inconsistent with that obligation for the United States to retain the surplus funds, the Tribunal considered the disposition of the surplus funds. The Tribunal noted that no specific provision in the Accords deals with the matter but added that the absence of a specific rule "cannot have the effect of nullifying the broad commitment assumed by the United States in General Principle A."⁸ The silence of the Accords on this point simply left "a few problems relating to the procedure and timing of the return to Iran of these funds."⁹ In addition, the Tribunal noted that there were a few outstanding disputed claims against Dollar Account No. 1 and it concluded that

the implementation of General Principle A of the General Declaration requires . . . that the two Parties should immediately enter into negotiation . . . with a view to determine . . . which claims are presently pending against Dollar Account No. 1 and what amount should consequently be kept in this Account in order to pay such claims. In the same agreement, the Parties should determine what amount of the funds presently held in Dollar Account No. 1 is not needed to pay the remaining claims pending against this Account, and such amount should be transferred to Iran immediately¹⁰

Finally, the Tribunal observed that "[s]hould the Parties be unable to arrive at such an agreement in the four (4) months following the issuance of this Award, they may apply to this Tribunal, individually or jointly, in order to resolve the remaining difficulties."¹¹

In their dissenting opinion, Arbitrators Holtzmann, Aldrich and Brower disagreed with the majority's conclusion that the General Principles set forth primary, enforceable obligations. In their opinion, "the General Principles of the General Declaration simply state the conceptual background against which the substantive provisions of the Declaration are to be viewed and, if necessary, interpreted."¹² The U.S.-appointed arbitrators also observed that "the United States *did* 'restore the financial position of Iran, in so far as possible' " by lifting the freeze on Iranian assets imposed by President Carter.¹³ According to the dissenting arbitrators, the Tribunal should have adopted a solution that maintained the status quo in relation to a matter which had not been dealt with specifically by the parties, as in Case No. A-1¹⁴ (involving interest on monies in the Security Account) in which the Tribunal had ordered that the accrued interest should be held in a separate account, unless and until the parties agreed on a different disposition or, absent agreement, that the interest should be returned to Iran when all claims against the Security Account were satisfied. The minority also asserted

⁸ *Id.* at 26.

⁹ *Id.*

¹⁰ *Id.* at 31.

¹¹ *Id.* at 33.

¹² AWD 63-A-15-(I:G)-FT (1986), Dissenting Opinion of Arbitrators Holtzmann, Aldrich, and Brower, at 6.

¹³ *Id.* at 2 (emphasis in original).

¹⁴ Iran v. United States, AWD 12-A-1-FT (Aug. 3, 1982) (Full Tribunal).

that the provisions in the Accords relating to the Escrow and Security Accounts—which provide that any surplus not be returned to Iran until all claims are satisfied—should also apply to Dollar Account No. 1.¹⁵

The importance of this decision lies in the Tribunal's interpretation of General Principle A. As the Tribunal noted, the obligations it imposes on the United States, if interpreted as separate obligations, are very wide indeed. While the Tribunal stated that the “framework . . . and . . . provisions of the two declarations” provide a limit, it remains to be seen how this limit will be interpreted in the future.

The 4-month deadline set by the Tribunal to effect the return of the funds passed on December 20, 1986, with no agreement having been reached. In mid-January 1987, both parties filed additional applications with the Tribunal on this matter. As of this writing, the Tribunal has not responded to these applications.

¹⁵ The Tribunal had noted the provisions relating to the other two accounts, but had rejected them by relying on the legal maxim *expressio unius est exclusio alterius*. Slip op. at 27.

CURRENT DEVELOPMENTS

THE STRASBOURG DECLARATION ON THE RIGHT TO LEAVE AND RETURN

A small 3-day meeting of international lawyers and other experts was convened by the International Institute of Human Rights in Strasbourg, France, in November 1986 to consider the current status of the right to leave any country, including one's own, and to return to one's country. The approximately 30 participants were from Costa Rica, Egypt, the Federal Republic of Germany, France, Morocco, the Netherlands, Sweden, Switzerland, the United Kingdom, the United States and Zambia.

The meeting was organized in response to growing international concern over impediments placed by many countries on the free exercise of the right to leave and return, which is guaranteed under Article 13 of the Universal Declaration of Human Rights and Article 12 of the Covenant on Civil and Political Rights. This concern had been reflected in a decision by the United Nations Economic and Social Council to approve the preparation of a study on current trends regarding the right to leave and return and related issues, to be undertaken by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.¹ The Sub-Commission's special rapporteur on this topic, C. L. C. Mubanga-Chipoya of Zambia, attended the Strasbourg meeting, another purpose of which was to assist him in his task of drawing up a draft declaration on the right to leave and return for consideration by the UN Commission on Human Rights.²

Following a general discussion during the first day, the participants and a drafting committee spent most of their time considering a declaration that could serve as a model for the special rapporteur and the Sub-Commission, and that would take into account developments since the entry into force of the Covenant in 1976. Among the documents upon which the subsequent "Strasbourg Declaration" is based are the draft declaration adopted by the Sub-Commission after an early study on the right to leave and return by Judge José Inglés;³ the declaration adopted by an international colloquium

¹ ESC Res. 1984/29, UN Doc. E/1984/INF/4, at 45 (1984). The special rapporteur's broad mandate includes:

an analysis of current trends and developments in respect of the right of everyone to leave any country, including his own, and to return to his country, and to have the possibility to enter other countries, without discrimination or hindrance, especially of the right to employment, taking into account the need to avoid the phenomenon of the brain drain from developing countries and the question of recompensing those countries for the loss incurred, and to study in particular the extent of restrictions permissible under article 12, paragraph 3, of the International Covenant on Civil and Political Rights.

² UN Comm'n on Human Rights Res. 1985/22, UN ESCOR Supp. (No. 2) at 56, UN Doc. E/1985/22 (1985).

³ See generally J. INGLÉS, STUDY OF DISCRIMINATION IN RESPECT OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY (UN Pub. Sales No. 64.XIV.2) (first issued as UN Doc. E/CN.4/Sub.2/220/Rev.1 (1963)).

in Uppsala, Sweden, in 1972;⁴ the conclusions and recommendations of a study prepared by the Procedural Aspects of International Law Institute and a draft declaration based on them;⁵ and a draft declaration prepared by Professor M. Cherif Bassiouni of DePaul University. The PAIL draft was adopted as the working text, although it underwent substantial amendment prior to its final adoption by consensus.

The Strasbourg Declaration on the Right to Leave and Return does not address some of the broader issues of the special rapporteur's mandate, such as the possibility of employment and issues related to the so-called brain drain. However, the latter was recognized as a possibly serious problem in some situations, and the meeting adopted a separate formal recommendation that, *inter alia*, concludes that "the international community should give urgent consideration to promoting bilateral and multilateral measures of protection and compensation to those developing countries which have suffered significant prejudice" as a result of the exercise by persons of their right to leave, and that an international expert meeting be convened to consider this question in greater detail.

The Strasbourg Declaration includes several significant advances over previous texts and integrates fundamental principles of international human rights, such as the right to know and act upon one's rights,⁶ into its provisions. With respect to the right to leave, Article 4 details the narrow grounds on which the right may be restricted and defines in general terms the limitations permissible under Article 12 of the Covenant on Civil and Political Rights.⁷ The importance of travel documents is underscored in detailed provisions on procedural safeguards.⁸ The declaration also declares that the right to leave one's country cannot be conditioned on renunciation of nationality and that seeking to exercise the right should not subject the applicant to any sanction, penalty, reprisal or harassment.⁹

The declaration sets forth the right to enter or return to one's country in absolute terms¹⁰ and attempts to clarify the somewhat murky definition of the term "one's own country," which is used in the Covenant, by declaring that "[p]ermanent legal residents who temporarily leave their country of residence shall not be arbitrarily denied the right to return to that country."¹¹ While the participants could not entirely agree on the appropriate state obligations with respect to others seeking entry, a consensus was reached

⁴ See *THE RIGHT TO LEAVE AND TO RETURN: PAPERS AND RECOMMENDATIONS OF THE INTERNATIONAL COLLOQUIUM HELD IN UPPSALA, SWEDEN, 19-21 JUNE 1972* (K. Vasak & S. Liskofsky eds. 1976).

⁵ H. HANNUM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* (1987).

⁶ See especially Arts. 2, 3, 10(a) and (b), and 12. The declaration is printed below as an appendix to this introductory note.

⁷ Article 4 draws in part upon the "Siracusa Principles" on limitation and derogation provisions adopted by an NGO meeting in Siracusa, Italy, in 1984. See *Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 7 HUM. RTS. Q. 1 (1985).

⁸ Arts. 9 and 10.

⁹ Art. 3.

¹⁰ Art. 6.

¹¹ Art. 7.

that, in individual cases, "a state should give sympathetic consideration to permitting the return of a former resident . . . who has maintained strong *bona fide* links with that state."¹²

The Strasbourg Declaration is the most recent attempt to give greater content and protection to the right to leave and return, the ultimate right to "personal self-determination."¹³ It is to be hoped that this third serious effort in as many decades (following that of Judge Inglés in 1963 and the Uppsala Colloquium in 1972) will inspire the United Nations to deal with this issue as it has dealt in recent years with torture, religious intolerance and other fundamental rights.

HURST HANNUM*

APPENDIX

STRASBOURG DECLARATION ON THE RIGHT TO LEAVE AND RETURN[†]

PREAMBLE

The Meeting of Experts on the Right to Leave and Return,

Recognizing that respect for human rights and fundamental freedoms is essential for peace, justice and well-being and is necessary to ensure the development of friendly relations and co-operation among all states;

Recalling that the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, as well as regional conventions, recognize the fundamental principle, based on general international law, that everyone has the right to leave any country, including one's own, and to return to one's own country;

Emphasizing that the right of everyone to leave any country and to enter one's own country is indispensable for the full enjoyment of all civil, political, economic, social and cultural rights;

Concerned that the denial of this right is the cause of widespread human suffering, a source of international tensions, and an object of international concern;

Adopts the following Declaration:

Article 1

Everyone has the right to leave any country, including one's own, temporarily or permanently, and to enter one's own country, without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, marriage, age (except for unemancipated minors independently of their parents), or other status.

¹² Art. 8.

¹³ J. INGLÉS, *supra* note 3, at 9.

* Executive Director, Procedural Aspects of International Law Institute.

[†] Adopted on November 26, 1986.

Article 2

Every state shall adopt such legislative or other measures as may be necessary to ensure the full and effective enjoyment of the rights set forth in this Declaration.

All laws, administrative regulations or other provisions affecting the enjoyment of these rights shall be published and made easily accessible.

*THE RIGHT TO LEAVE**Article 3*

a) No person shall be subjected to any sanction, penalty, reprisal or harassment for seeking to exercise or for exercising the right to leave a country, such as acts which adversely affect, inter alia, employment, housing, residence status or social, economic or educational benefits.

b) No person shall be required to renounce his or her nationality in order to leave a country, nor shall a person be deprived of nationality for seeking to exercise or for exercising the right to leave a country.

c) No person shall be denied the right to leave a country on the grounds that that person wishes to renounce or has renounced his or her nationality.

Article 4

a) No restriction may be imposed on the right to leave except those which are

- 1) provided by law;
- 2) necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others; and
- 3) consistent with internationally recognized human rights and other international legal obligations.

Any such restriction shall be narrowly construed.

b) Any restriction on the right to leave shall be clear, specific and not subject to arbitrary application.

c) A restriction shall be considered "necessary" only if it responds to a pressing public and social need, pursues a legitimate aim and is proportionate to that aim.

d) A restriction based on "national security" may be invoked only in situations where the exercise of the right poses a clear, imminent and serious danger to the state. When this restriction is invoked on the ground that an individual acquired military secrets, the restriction shall be applicable only for a limited time, appropriate to the specific circumstances, which should not be more than five years after the individual acquired such secrets.

e) A restriction based on "public order (*ordre public*)" shall be directly related to the specific interest which is sought to be protected. "Public order (*ordre public*)" means the universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based.

f) A restriction based on "the rights and freedoms of others" shall not imply that relatives (except for parents with respect to unemancipated minors), employers or other persons may prevent, by withholding their consent, the departure of any person seeking to leave a country.

g) No fees, taxes or other exactions shall be imposed for seeking to exercise or exercising the right to leave a country, with the exception of nominal fees related to travel documents.

h) Permissibility of restrictions on the right to leave is subject to international scrutiny. The burden of justifying any such restriction lies with the state.

Article 5

- a) Any person leaving a country shall be entitled to take out of that country
1. his or her personal property, including household effects and property connected with the exercise of that person's profession or skill;
 2. all other property or the proceeds thereof, subject only to the satisfaction of legal monetary obligations, such as maintenance obligations to family members, and to general controls imposed by law to safeguard the national economy, provided that such controls do not have the effect of denying the exercise of the right.
- b) Property or the proceeds thereof which cannot be taken out of the country shall remain vested in the departing owner, who shall be free to dispose of such property or proceeds within the country.

RIGHT TO ENTER OR RETURN

Article 6

- a) No one shall be deprived of the right to enter his or her own country.
- b) No person shall be deprived of nationality or citizenship in order to exile or to prevent that person from exercising the right to enter his or her country.
- c) No entry visa may be required to enter one's own country.

Article 7

Permanent legal residents who temporarily leave their country of residence shall not be arbitrarily denied the right to return to that country.

Article 8

On humanitarian grounds, a state should give sympathetic consideration to permitting the return of a former resident, in particular a stateless person, who has maintained strong *bona fide* links with that state.

PROCEDURAL SAFEGUARDS

Article 9

Everyone has the right to obtain such travel or other documents as may be necessary to leave any country or to enter one's own country. Such documents shall be issued free of charge or subject only to nominal fees.

Article 10

- a) Any national procedures or requirements affecting the exercise of the rights set forth in this Declaration shall be established by law or administrative regulations adopted pursuant to law.

b) Everyone shall have the right to communicate as necessary with any person, including foreign consular or diplomatic officials, for the realisation of the rights set forth in this Declaration.

c) No state shall refuse to issue the documents referred to in Article 9 or shall otherwise impede the exercise of the right to leave, on the ground of the applicant's inability to present authorization to enter another country.

d) Procedures for the issuance of the documents referred to in Article 9 shall be expeditious and shall not be unreasonably lengthy or burdensome.

e) Everyone filing an application for any document referred to in Article 9 shall be entitled to obtain promptly a duly certified receipt for the application filed. Decisions regarding issuance of such documents shall be taken within a reasonable period of time specified by law. The applicant shall be promptly informed in writing of any decision denying, withdrawing, cancelling or postponing issuance of any such document; the specific reasons therefor; the facts upon which the decision is based; and the administrative or other remedies available to appeal the decision.

f) The right to appeal to a higher administrative or judicial authority shall be provided in all instances in which the right to leave or enter is denied. The appellant shall have a full opportunity to present the grounds for the appeal, to be represented by counsel of his or her choice, and to challenge the validity of any fact upon which a denial or restriction has been founded. The results of any appeal, specifying the reasons for the decision, shall be communicated promptly in writing to the appellant.

FINAL CLAUSES

Article 11

Any person claiming a violation of his or her rights set forth in this Declaration shall have effective recourse to a judicial or other independent tribunal to seek enforcement of those rights.

Article 12

No state may impede communication by any person with an international organization or other bodies or persons outside the state with regard to the rights set forth in this Declaration, and no sanction, penalty, reprisal or harassment may be imposed on anyone exercising this right of communication.

Article 13

The enjoyment of the rights set forth in this Declaration shall not be limited because of activities protected under internationally recognized human rights or other international legal obligations.

Article 14

Nothing in this Declaration shall be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at destroying any of the rights set forth herein or at limiting them to a greater extent than is provided for in this Declaration.

Article 15

The present Declaration shall not be interpreted to limit the enjoyment of any human right protected by international law.

RECOMMENDATION OF THE MEETING OF EXPERTS ON "THE RIGHT TO
LEAVE AND TO RETURN TO ONE'S COUNTRY"*

The Meeting of Experts,

Recalling that, in conformity with the Universal Declaration of Human Rights, everyone is entitled to an international order in which the rights set forth in that Declaration can be fully realised;

Noting that the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, as well as regional conventions, recognize the fundamental principle, based on general international law, that everyone has the right to leave any country, including one's own, and to return to one's own country;

Recognizing that the exercise by a large number or by particular categories of persons of the right to leave any country may have, in certain circumstances, adverse effects on legitimate national or social interests of developing countries, in particular on the available human resources of a country;

1. *Concludes* that, without limiting in any way the effective exercise by individuals of the rights set forth in the Strasbourg Declaration on the Right to Leave and Return, the international community should give urgent consideration to promoting bilateral and multilateral measures of protection and compensation to those developing countries which have suffered significant prejudice as a result of the voluntary exercise of these rights;

2. *Recommends* that the question of providing an adequate response to the economic and social consequences in developing countries of the exercise of the right to leave be submitted to an international expert meeting where international organizations concerned with this problem would be represented.

STATEMENT BY EXPERT PANEL: U.S. POLICY ON THE SETTLEMENT OF
DISPUTES IN THE LAW OF THE SEA

In 1983, President Reagan announced the policy of the United States to accept the normative provisions of the 1982 Convention on the Law of the Sea as reflecting the customary international law of the sea (in matters other than deep seabed mining).

Giving effect to that policy requires scrupulous respect for the provisions of the Convention by all agencies of the United States. It requires attentive scrutiny by the United States to assure compliance with those provisions by other countries. That policy, we are persuaded, requires also that there be

* Organized by the International Institute of Human Rights in Strasbourg, Nov. 24-26, 1986.

put in place "machinery" for prompt and peaceful resolution of disputes, notably those relating to navigation and overflight, and to protection against pollution in the coastal seas.

We recommend that the United States formally announce its willingness to accept, on condition of reciprocity, the obligation to submit to third-party arbitration or adjudication, disputes regarding the interpretation and application of the rules affecting navigation, overflight and pollution, as set forth in the Convention, in the same respect and to the same extent as is required of parties to the Convention. An early declaration to that effect by the President should be supported promptly by appropriate Congressional action and accompanied by efforts to encourage other countries to assume similar obligations.

The U.S. Interest in Compulsory Dispute Settlement

Much of the law of the sea today consists of principles of accommodation between the particular interests of coastal states and those of other states exercising their freedom of navigation and overflight. Those principles were agreed after extended negotiation and in major respects they were found acceptable, both to coastal states and to maritime states, only because they were accompanied by procedures for the settlement of disputes. For example, certain coastal state rights, such as control of pollution from ships, were accepted in the Convention on the assumption and condition of compulsory arbitration or adjudication. The privilege given a flag state to transfer certain pollution enforcement proceedings from coastal state courts to flag state courts probably would not have been accorded by the Convention if the flag state were not under a duty to control pollution from its ships that is enforceable through arbitration or adjudication.

In coastal areas, the coastal state has the power and numerous opportunities and temptations to bring pressure on navigation. Maritime states need assurance that coastal states will not attempt

- to use their general control of the territorial sea, and the right to take specific measures there, such as establishing safety zones or operating offshore installations, to hamper navigation and overflight;

- to use their authority over economic activities in the exclusive economic zone to restrict navigation;

- to use their authority to prevent pollution from ships in all zones of national jurisdiction—the territorial sea, international straits, archipelagic waters, or the economic zone—to control navigation in those areas;

- to expand the size of various zones of coastal states jurisdiction and the scope of their authority there.

The accommodations between coastal and maritime interests regarding navigation, overflight and environmental protection, reflected in various provisions of the Convention, will be subject to continuing pressures. Sometimes there will be confrontation; sometimes there will be acquiescence, as states grow reluctant to expend political, economic or military capital to protect their interests and the balance achieved in the Convention from

corrosive precedents. A compulsory and binding system of third-party settlement of disputes provides a "third option." Such an arrangement will induce greater self-restraint, encourage officials to seek legal advice before acting, and will impel lawyers to be cautious in their advice. Dispute settlement arrangements also provide a state that has acted in violation of the rules with a graceful retreat: it need not yield to pressure from another state, only to the rule of law as embodied in the binding judgment of a disinterested tribunal. A dispute settlement arrangement permits a state confident that it is acting within its rights to seek judgment confirming and vindicating its actions.

For the United States, in particular, stability and the security of its interests at sea depend on the willingness of other states, particularly coastal states, to agree to fair means for settling disputes that might not be resolved through direct diplomatic negotiation. United States representatives summed up the situation a decade ago: "a system of compulsory, impartial third-party adjudication is thus an essential element of the overall structure" for an international law of the sea.

Established dispute settlement arrangements are of particular importance to the United States in present circumstances. Especially since the United States has not adhered to the Convention, but will be asserting rights of navigation vis-à-vis other coastal states like those provided in the Convention, it may meet resistance from some coastal states, and United States determination may entail some risk of political, economic, or even military conflict. We believe that it is preferable to minimize the circumstances in which, if diplomacy fails, the United States is forced to choose between concession and conflict. It was for that reason that the United States took the lead in seeking a system of compulsory third-party settlement of disputes in the framework of the Convention. We believe that arrangements for compulsory dispute settlement are in the interest of the United States even if—perhaps especially if—it is not party to the Convention. If some states, resentful of U.S. failure to adhere to the Convention, are tempted to resist including the United States in dispute settlement arrangements, they might be reminded that U.S. acceptance of Convention rights valuable to them, such as coastal state rights in the Exclusive Economic Zone, or coastal state implementation of international pollution standards or the right of flag states to remove pollution enforcement proceedings to their own courts, may depend on such dispute settlement arrangements.

The compulsory settlement of disputes in the sea will serve both public and private interests in the United States. The nation has overall security, economic and environmental interests in encouraging states to behave in accordance with the requirements of the Convention regarding navigation, overflight, and pollution, and in resisting occasional temptations on its own part to set adverse precedents by doing otherwise. Dispute settlement is also in the particular interest of U.S. citizens and companies. Shipping and petroleum companies, airlines, importers and exporters, travelers and consumers, would be served by having compulsory dispute settlement procedures available in order to discourage unlawful detention of ships and aircraft and

to obtain their prompt release in the event of arrest. Workers and labor unions as well as employers have an interest in dispute settlement arrangements to protect the crews of such ships and aircraft against abuse: For example, the Convention provides that only monetary penalties, and not imprisonment, may be imposed for a pollution violation by a foreign ship in the economic zone; there is also a broad provision that "recognized rights of the accused" must be observed in the conduct of proceedings for such a violation. (Art. 230, paras. 1, 3.) The general interest of the United States in advancing human rights also would be served by having international tribunals interpret and apply this provision. Environmentalists (and environmentally sensitive companies) have an interest in dispute settlement procedures in order to encourage both flag states and coastal states to fulfill their substantial environmental obligations under the Convention. Dispute settlement of marine pollution issues will also promote uniform interpretation and enforcement of international environmental obligations generally as an alternative to the often ineffective or inefficient patchwork of national regulations.

The dispute settlement arrangement of the Convention is highly flexible and offers the United States a number of options:

- (a) arbitration in all cases;
- (b) arbitration in some cases of special importance to the United States;
- (c) use of the International Court of Justice in all cases;
- (d) use of the Court in some cases;
- (e) use of the International Tribunal on the Law of the Sea established by the Convention in all cases; and
- (f) use of the Tribunal in some cases.

We need not fear being compelled to adjudicate issues arising out of military activities since the Convention specifically authorizes the exclusion of such activities from the dispute settlement scheme. Of these procedures, only the International Tribunal on the Law of the Sea is a permanent institution established by and linked to the Convention. Its use is not required, but it is an option open even to non-parties to the Convention, and the United States may wish to consider its use at least for securing prompt release of detained vessels. Use of this Tribunal or of the International Court of Justice, is consistent with the policy of the United States to accept third-party settlement of disputes on particular issues on the basis of agreement with other states.

Giving Effect to Compulsory Dispute Settlement

U.S. participation in dispute settlement can be achieved by various means, including

1. dispute settlement agreements with other countries concluded (a) as treaties with the advice and consent of the Senate, or (b) as executive agreements pursuant to authority granted by Congress.

2. Congress might approve U.S. acceptance of compulsory dispute settlement on condition of reciprocity and subject to such other terms or limitations as may be found necessary. For example, using the reciprocating states provisions of the 1980 Deep Seabed Hard Minerals Resources Act (30 U.S.C. §1488) as a model, an act of Congress could specify the conditions for U.S. acceptance of the dispute settlement provisions of the Convention, and authorize the Secretary of State to designate a foreign state as "a reciprocating state" if he finds that that state has accepted the dispute settlement provisions of the LOS Convention in relation to the United States.

Agreement to compulsory dispute settlement on navigation and overflight and pollution issues to the extent required by the Convention would enhance our ability to achieve the goals of the oceans policy outlined by President Reagan in his statement of March 10, 1983. It would underscore the seriousness of our desire to ensure that we and others behave in accordance with the provisions of the Convention regarding navigation, overflight and pollution, and to promote and maintain the rule of law at sea.

PANEL ON THE LAW OF OCEAN USES*

THE UN GROUP OF GOVERNMENTAL EXPERTS ON INTERNATIONAL CO-OPERATION TO AVERT NEW FLOWS OF REFUGEES: PART II

This is the second of a two-part report on the UN Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees.¹ The group completed its work in May 1986 when it submitted its report to the Secretary-General for transmittal to the General Assembly.² It had held eight sessions in New York, two every spring since April 1983 of mainly 2-week duration each, and had closely followed the Programme of Work adopted at its second session.³

At its third session, the group reviewed the circumstances causing new massive flows of refugees, dividing them into "man-made" and "natural" causes and subdividing the former into "political causes" and "socio-economic factors."⁴ In distinguishing "factors" from "causes," the group took the definition of "refugee" as one who is outside his own country and has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."⁵

* This statement was adopted on March 7, 1986. The following members of the Panel participated: Gordon Becker, Jonathan I. Charney, Thomas A. Clingan, Jr., John L. Hargrove, Louis Henkin, Jon L. Jacobson, Terry L. Leitzell, Edward Miles, J. Daniel Nyhart, Bernard H. Oxman, Giulio Pontecorvo, Horace B. Robertson, Jr., J. T. Smith, and Louis B. Sohn.

¹ For the earlier report, see Lee, *The UN Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees*, 78 AJIL 480 (1984).

² See UN Doc. A/41/324 (1986) [hereinafter cited as Report].

³ See Lee, *supra* note 1, at 481-82.

⁴ Report, *supra* note 2, ch. III-A.

⁵ See Convention Relating to the Status of Refugees, July 28, 1951, 19 UST 6259, TIAS No. 6577, 189 UNTS 150, Art. 1(A)(2). See also Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 UNTS 267, 19 UST 6223, TIAS No. 6577, Art. 1(2) (which incorporates the above definition).

Thus, the group equated "man-made" with "political" causes, which may be aggravated by "socio-economic factors." The implication is clear: "socio-economic factors" by themselves do not cause *refugee* flows.

There was considerable controversy over the inclusion of natural disasters (heavy floods, prolonged drought, soil erosion, earthquakes, desertification) as "causes" of massive flows of refugees.⁶ Strictly speaking, the same rationale for regarding "socio-economic" conditions as mere "factors," instead of "causes," of refugee flows ought also to apply to natural disasters, since the essential element of "persecution" is missing. The decision on "natural causes" was thus politically motivated,⁷ and not based on logic.

After reviewing the "appropriate means" to avert new massive flows of refugees, the group concluded that the governing "international instruments, norms and principles" in this field are already adequate.⁸ What is lacking is their effective implementation.⁹ Hence the group's focus on "international machinery and practice" in its conclusions and recommendations.

Permeating the proceedings of the group was the tension between non-intervention and state responsibility as the guiding principle to avert new massive flows of refugees. Significantly, in its conclusions, the group characterizes massive refugee flows as capable of "endangering international peace and security," the prevention of which is "a matter of serious concern to the international community as a whole."¹⁰ Since any act "endangering international peace and security" is a violation of the United Nations Charter,¹¹ it is by definition an "internationally wrongful act"¹² entailing the international responsibility of the state concerned.¹³ Accordingly, individual and collective responses to such an act,¹⁴ under the circumstances, would not constitute intervention in the internal affairs of that state. The group's conclusions thus settle, once and for all, the oft-heard argument that the generation of refugees or mass expulsion of citizens is an internal affair, brooking no outside interference.

Notwithstanding the consensus rule and the composition of its membership, which favored refugee-generating countries,¹⁵ the group was able to make some important recommendations. It reaffirmed not only the general "obligations" of states to respect the principles contained in the Charter of

⁶ Report, *supra* note 2, ch. III-B.

⁷ Apparently in view of the fact that large numbers of people driven across national boundaries by drought or spreading deserts in Africa have been treated as "refugees."

⁸ Report, *supra* note 2, para. 47.

⁹ *Id.*, para. 53.

¹⁰ *Id.*, para. 63.

¹¹ See, in particular, Art. 1(1) and ch. VII.

¹² See Art. 19(1) of the Draft Articles on State Responsibility, Part I, adopted on first reading by the International Law Commission, [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 30, UN Doc. A/CN.4/SER.A/1980/Add.1. For commentary on this article, see [1976] 2 *id.*, pt. 2 at 95-122, UN Doc. A/CN.4/SER.A/1976/Add.1.

¹³ See Art. 1, Draft Articles on State Responsibility, *supra* note 12.

¹⁴ See Fifth Report on the Content, Forms and Degrees of State Responsibility (Part Two of the Draft Articles), UN Doc. A/CN.4/380 and Corr.1 (1984); Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AJIL 532, 562-63 (1986).

¹⁵ An analysis of these and other features of the Group of Experts will appear in another paper.

the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States,¹⁶ but also such specific "obligations" as those pertaining to voluntary repatriation, adequate compensation, regional cooperation and mass expulsion.¹⁷

Of special interest was the proposed designation in a draft report of a "special representative of the Secretary-General on international co-operation to avert new massive flows of refugees." The special representative was to serve as the focal point in the UN system for monitoring developments that threaten to cause new flows of refugees, mobilizing the states concerned and competent UN organs to deal with such flows, establishing an early warning system and reviewing preventive measures taken, and reporting to the General Assembly or the Security Council.¹⁸ Although this proposal was not adopted, the Secretary-General is called upon in the group's report to:

- (a) Give continuing attention to the question of averting new massive flows of refugees;
- (b) Ensure that timely and fuller information relevant to the matter is available within the Secretariat;
- (c) Improve co-ordination within the Secretariat for analysing the information, so as to obtain an early assessment on the situation which might give rise to new massive flows of refugees and to make the necessary information available to the competent United Nations organs in consultation with the States directly concerned;
- (d) Help improve the co-ordination, within the Secretariat, of the efforts of United Nations organs and specialized agencies and of Member States concerned for timely and more effective action;
- (e) Consider taking such measures as are necessary for the purposes enumerated in this paragraph.¹⁹

The report containing the above recommendation is adopted in General Assembly Resolution 41/70 of December 3, 1986. Accordingly, the Secretary-General can still, if he so chooses, entrust the tasks of the proposed "special representative" to an existing "Under-Secretary-General" or "Assistant Secretary-General" as an added responsibility, so long as these tasks could be performed within the existing "limits of financial and personnel resources available to the Secretariat."²⁰

A final observation: The mere creation of the group and its substantial accomplishments have raised the world's consciousness about the root causes of refugee flows and the responsibility of states, particularly the states of origin, in this area. There is no doubt that effective implementation of the group's recommendations will bring us closer to a world without refugees.

LUKE T. LEE*

¹⁶ Report, *supra* note 2, para. 66(a) and (b). ¹⁷ *Id.*, para. 66(c)-(f).

¹⁸ UN Doc. A/AC.213/1985/WP.5, ch. V-B-g (1985).

¹⁹ Report, *supra* note 2, para. 70.

²⁰ *Id.*, para. 71.

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BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn. Edited by T. Buergenthal. Kehl, Strasbourg, Arlington: N.P. Engel, Publisher, 1984. Pp. viii, 571. \$56; £42; DM 168.

Professor Louis B. Sohn certainly merits and is fortunate to have been honored by such a variegated and interesting set of essays. Some break new ground. Others provide valuable perspectives on the ups and downs of world public order in modern times. A few are controversial. The collection reflects the sure hand and the discriminatingly wise eye of the editor, Professor Thomas Buergenthal. The operative portion of the table of contents shows the range of coverage, one that coincides with three of the major sectors in which Sohn has worked: human rights, law of the sea and environment, and international organizations.

In part 1, "Human Rights," Professor Meron's useful essay, *Human Rights in Time of Peace and in Time of Armed Strife*, examines the growing convergence of substantive human rights (as stated in instruments of international human rights law) and international humanitarian law; thus making desirable linkages without, one hopes, provoking *guerres des savants*.

Mr. Garibaldi, in *On the Ideological Content of Human Rights Instruments*, attacks the notion that human rights instruments are "ideologically neutral," and thus focuses attention on a tremendous problem: the free world and the socialist bloc divergence on the essential elements of "democratic societies." This focus may be necessary for scholars in their closets, although it is obvious to most who have encountered these differences operationally.

Dr. Dolzer (*Menschenrechte und Fremdenrechte*) goes deeply (more deeply than my rudimentary German permits me to go with him) into the fascinating topic raised some years ago by Professor Francisco García-Amador:¹ property rights as human rights. Although the focus of the essay is on regional human rights protection systems, such as the European one, the possible convergence of old-fashioned diplomatic protection and a human right "to have and to hold" is not far from conscious contemplation. And the Duke of Bedford's resort to the Strasbourg human rights system in default of a right to litigate "just compensation" in Britain for eminent domain as to London realty is linked to an aspect of Garibaldi's contribution: could a Marxist system coexist with a human right to private property?

In an anecdotal piece, *The Frolova Case*, Professor D'Amato writes, ap-

¹ International Responsibility: (First) Report, [1956] 2 Y.B. INT'L L. COMM'N 173, 221, UN Doc. A/CN.4/1956/Add.1.

parently without tongue-in-cheek, of his success in getting an American bride's hunger-striking Soviet husband out of the USSR by mounting a federal court suit against the Soviet Union under the "foreign tort in the U.S." provision of the Foreign Sovereign Immunities Act (FSIA).² Luckily, perhaps, his *Frolova* case was not sanctioned as frivolous³ by the judge who eventually dismissed it under the act of state doctrine.⁴ D'Amato implicitly advocates a degree of analogistic extremism in the pursuit of human rights in municipal litigation that more restrained exponents with very good reasons are—or have become—cautious about.⁵

Professor Faundez-Ledesma deals with the extremely serious matter of human rights when states (particularly in Latin America) declare situations of emergency (*La Protección de los Derechos Humanos en Situaciones de Emergencia*). The interrelationships between national emergencies laws and human rights conventions and the risks of detriment to the latter are realistically appraised. The analysis is candid and the challenge is stated. No easy solutions are vouchsafed.

Buergeth deals lucidly and in a balanced way with the advisory jurisdiction of the Court of which he is now President, the Inter-American Court of Human Rights. His tributes to his teacher, Sohn, both in the preface and at the end of his essay, are clearly heartfelt.

The first four essays in part 2, "Law of the Sea and Environment," recognize Sohn's influence on the 1982 Convention on the Law of the Sea. One hopes that these perspectives will have, one day, a role to play in the actual processes of dispute settlement about our watery planet's waters.

Attorney and Professor Bleicher, in *The Law Governing Exploitation of Polymetallic Sulfide Deposits from the Seabed*, provides one of the most exciting but, at the same time, disturbing pieces of information about deep ocean mining: polymetallic sulfide deposits of virtually unknown potential when the 1982 UN Convention was in gestation may become as important—or more important—than the famous nodules! And they present recovery and related

² 28 U.S.C. §1605(a)(5) (1982).

³ The tightening of FRCP Rule 11 in recent years has prompted both activity in bar association and law-improvement circles and some public comment, N.Y. Times, Oct. 2, 1986, at A25, col. 2.

⁴ The writer did not say whether dismissal preceded or followed the Soviet Union's release of the bridegroom.

⁵ Especially since the disposition of a suit that divided human rights activists on the advisability of its being brought in an American court, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), and the extraordinary default judgment in *Von Dardel v. Union of Soviet Socialist Republics*, 623 F.Supp. 246 (D.D.C. 1985), summarized in 80 AJIL 177 (1986), which will not be reviewed due to the continued abstention of the respondent. In this latter instance, D'Amato and his associated counsel, far from being sanctioned under Rule 11 as some had feared, won by an implausible combination of the FSIA and the Alien Tort Statute (28 U.S.C. §1350 (1982)) to reach (as tortious) acts that began in Budapest, Hungary, during the later days of World War II, involving the detention and disappearance of Swedish diplomat Raoul Wallenberg. Nonetheless, whether the outcome will encourage wider resort by aliens to suits against foreign states for injuries localized abroad, despite the new teeth in Rule 11, is problematical. Cf. *Johnson v. New York City Transit Authority*, 639 F.Supp. 887 (E.D.N.Y. 1986), and a spate of cases listed cumulatively as of Oct. 6, 1986, under Rule 11 for 640 F.Supp.

problems that the Convention did not foresee. Let us hope that this new example of legal projections being overtaken by scientific discovery does not have so destructive an effect as the first aerial bomb dropped in World War I had on the learned Professor Fauchille's "très logique" application of an innocent passage concept to "aerostats" in national airspace!⁶

In *To Achieve the Desirable: The United Nations Marine Resources Organization*, one is touched by Professor Stern's evocation of Sohn's "few thousand pages of mimeographed materials" on "World Law" issued to students 37 years before, when the United Nations was only 2 years old. One is sobered and prepared in part for Professor Franck's magistral essay in part 3 by Stern's additional recollection:

Our exploration of old and new organizations went smoothly until the midsemester. Then the issue which clearly dominated the rest of that semester surfaced. What had become clear was that the division of authority between the Security Council and the General Assembly left an enormous management void and that the void could not be filled by the Secretary General.

Sohn has never left off his inquiry into this dilemma . . . [p. 229].

Stern then puts forward a "potential model" to resolve the problem, a "UN Marine Resources Organization" to be "[e]ndowed with a true legislative body shaped against [the] background of the UNCLOS III negotiations." Truly, this is a laudable and technically feasible solution—if only structuralist solutions themselves were feasible in the present world political environment.

Professor Weiss breaks new conceptual ground in her essay on *Conservation and Equity Between Generations*. Aside from political declamations about saddling future generations with debt, law and politics have not focused much on "posterity," despite the Preamble to the 1789 Constitution. Weiss most rightly tells us that "the international community must be concerned at the global level with the natural heritage that we pass to future generations." Fortunately, her concept of the duty to do "equity between generations" is not left suspended; she sets out "proposed principles" (pp. 255–64) and their application and implementation. The significance of Weiss's contribution is its goal-oriented perspective and its rich content beyond mere structural arrangements. Despite the current frailty of efforts to contain the use of force and to provide a better "common heritage," if the species is to survive it must also not rob "spaceship earth" of its irreplaceable life support systems. While the lawyer's propensity to devise systems often overlooks the real problems of effectiveness, most would accept the need for concepts at the "Grand Design" level. We have such concepts here.

Part 3, "International Organizations," contains wide-ranging surveys of international organizational situations and needs. Two of the essays bear on the ineluctable current problem of the post-World War II Grand Design, viz., *The Problem of Effectiveness*.

⁶ Fauchille, *Draft Convention, Regime of Aerostats and Wireless Telegraphy*, 21 ANNUAIRE DE DROIT INTERNATIONAL 293, 327 (1907); J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 230–31 (2d ed. 1981).

A wise essay by Franck (*Great Expectations*) explains that today's depressed American attitude towards the United Nations is to a considerable degree the backlash from earlier failures to perceive the Organization clearly and wholly, both as to inherent limitations and realizable promise. The analysis is good for those who were sentient and attentive at the creation and essential for those who were not. Franck captures a characteristic of American public opinion that others have noted:⁷ ebullient overexpectations for new structures, combined with a "set it and forget it" idiosyncrasy (i.e., a comfortable belief that arrangements, once made, will work pretty much on their own). His conclusion by implication is that with so much inflated expectation it is not surprising that when times of difficult operations come, a negative, "abandon ship" attitude arises. His clearly expounded descriptions of these tendencies may help to ameliorate them.

From his title (my translation), "The Inter-American System: Between Unilateralism and Inoperativeness," I expected that attorney Díaz of Mexico would weigh evenhandedly the negative aspects of the Reagan administration's notorious "go it alone" policies in relation to all international organizations, including the Organization of American States, and the many evasions by Latin American members of their responsibilities in such organizations. Regrettably, Díaz has written a "blame it all on the gringos" polemic, linked to the Falklands/Malvinas crisis as it was dealt with in the OAS. Somehow, he sees it as a virtue that all but a handful of Latin members completely disregarded their obligations to resist naked, irredentist aggression by a military junta of torturers and ignoramuses and as yet another North American vice that the United States (and a few others) opposed this flouting of fundamental limits on the use of force.

While I very well understand—perhaps better than 99.9 percent of my fellow countrymen⁸—the unfortunate effects of U.S. hemispheric policy up to the mid-1920s, or, if Díaz prefers, 1933, I am distressed by the lack of objectivity displayed in this piece in this symposium. It does not have the flavor of Sohn; nor can it speak to the many in this country who at this time are doing all they can to prevent regressions to darker times.⁹ Worse, it tends to encourage further abandonments of principles within Latin America.

We have an interesting contrast between Franck and Díaz: the first directs

⁷ Among others, de Toqueville, Kennan, C. P. Snow. Cf. Oliver, *Reflections on Two Recent Developments Affecting the Function of Law in the International Community*, 30 TEX. L. REV. 815, 833-34 (1952).

⁸ Through upbringing, age, linguistic proficiency and cultural affinity.

⁹ Compare the lengthy and highly controversial apologia for Reagan administration policy in Central America, Moore, *The Secret War in Central America and the Future of World Order*, 80 AJIL 43 (1986), and the replies thereto now coming into print such as Rowles, "Secret Wars," *Self-Defense and the Charter—A Reply to Professor Moore*, *id.* at 568. This note was rewritten on October 8, 1986, when further covert destabilizing action against Nicaragua, possibly linked to the United States, or involving failure of the Executive to enforce our neutrality and munitions export control laws was being reported. A new Black Legend for the likes of Lic. Díaz is in the making. Under the circumstances it is not possible to laugh Díaz off today with a reference to a well-known pragmatist's (Sancho Panza's) response to a rather famous Believer-in-Monsters: "But Sir! They are but windmills!"

Americans to criticize themselves and correct errors of perception. The latter defends the undermining of international organizational structures for the "inherent vice" of *yanqui* influence!

Professor Nafziger, in his essay, calls attention to an aspect of the International Court of Justice that must have crossed the minds of many readers of its opinions, the writings themselves. It is evident, alas, that his helpful evaluations and criticisms did not have much effect on most of the writing in *Nicaragua v. United States*! But better clumsy ICJ opinions than none at all, perhaps we will have to say for the short haul, as a result of the incredible stances of the respondent at the various stages of this very, very important development, whose potentially negative effects cannot yet be appraised with assurance. May the Court live to heed the advice of Nafziger!

Professor Boyle, writing of Lebanon in August 1983, described what then might have been a courageous possibility for a solution conforming to international legal principles and modalities. As of this date, his essay illustrates in somber measure the tragic drift to transnational anarchy in the Middle East.

Professor Gottlieb's model of a "framework state" for Palestine, together with an appendix containing proposed drafts for its creation, is linked by the author to Sohn's classic structuralistic energy and optimism. That the plan seems very remote from acceptance once again suggests that in a "true conflict of interest" situation, structural solutions are generally secondary to accommodations of a psycho-diplomatic, negotiations-linked nature.

The other essays in part 3 are fairly specialized. Such sharp focuses are most useful in particularized situations. The coverage by these former students and colleagues of Sohn further expands our comprehension of the wide range of his influence and of his great contribution to world peace and just order.

COVEY T. OLIVER
Board of Editors

Public International Law in a Nutshell. By Thomas Buergenthal and Harold G. Maier. St. Paul: West Publishing Co., 1985. Pp. xxxix, 262. Index. \$11.95.

A major gap in the teaching materials for public international law is the paucity of books that succinctly set forth an overview of existing law. Students invariably ask for this. Practitioners who may be only occasionally exposed to such issues also need a concise introduction to basic doctrines and methodology. *Public International Law in a Nutshell* meets these needs. It is part of the Nutshell series of West Publishing Company, which since the mid-1970s has published many volumes on subjects of domestic law such as corporate taxation, family law and injunctions. It follows Sohn and Gustafson's excellent Nutshell volume on the law of the sea. It is a useful addition to Michael Akehurst's more detailed *A Modern Introduction to International Law* (5th ed. 1984).

The book is organized into 10 chapters that address in order the application and relevance of international law, sources of international law, international organizations, international dispute settlement, international law of treaties, rights of individuals, jurisdiction, foreign relations law in the United States, immunities and international legal research resources. The material is well researched, generally carefully summarized and clearly written. The chapters on jurisdiction and on international human rights law are exceptionally well written; the latter covers material on the various regional human rights institutions, which is otherwise difficult to find in one place. The generous attention to arbitration in the chapter on dispute settlement is timely and valuable. The last chapter, on international legal research sources, may prove to be the most useful to both practitioners and students, for it provides a clear guide to researching the many sources of international law. The authors deserve praise for including it.

The choice of topics is puzzling, however, and there are no criteria to clarify the choice. The chapter on international organizations, while excellent, might usefully have been expanded and published as a separate Nutshell volume. The subject frequently appears as a separate course in law schools. The wisdom of the heavy focus on U.S. law is questionable in a volume that purports to provide basic coverage of public international law. Over 60 pages, one-quarter of the book, are devoted to a discussion of U.S. foreign relations law, the U.S. foreign sovereign immunity statute, the act of state doctrine and U.S. jurisdictional law. As acknowledged by the authors, some very significant issues in international law are, as a result, not treated at all. These include international law related to the use of force (both collective security and terrorism), international economic (trade and monetary) law and international environmental and natural resources law. To these can be added such topics as sanctions, arms control, outer space and communications.

While it is impossible to treat all subjects in a single Nutshell volume, the failure to address some of those that have been most significant in the last few years may be a little disappointing to some readers. Perhaps this suggests a need for a companion volume.

In the topics covered, the authors provide a well-informed, up-to-date and careful statement of international legal doctrine. For this they deserve great credit. In a field plagued with controversy, this is not an easy task. A few readers may notice an occasional bias in favor of the U.S. position on controversial legal issues such as the U.S. effort to withdraw from World Court jurisdiction in *Nicaragua v. United States* (pp. 81-83), but generally the treatment is exceptionally balanced and fair.

The volume is highly recommended to all students of public international law and to all practitioners who desire an introduction to the methodology of international law and to some of the basic doctrines.

EDITH BROWN WEISS
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The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs. By Anthony Carty. Manchester and Dover, N.H.: Manchester University Press, 1986. Pp. x, 138. Index. \$40.

Tony Carty criticizes public international law on the basis of its own theoretical foundations. He does not condemn international law for political naivety, Eurocentrism or imperialist sympathies. He neither bemoans its historical infancy nor chastises its moral failures. Since international law cannot sustain its claims to comprehensiveness without jettisoning its predominant theory of the state, Carty argues, international society is best thought of as a Hobbesian state of nature.

Carty's argument is difficult to untangle because he advances a number of organizing themes for the divergent issues pursued in his seven short chapters. Carty's most telling criticisms are directed at international law's claims to "completeness." He argues that international law claims to "define comprehensively the rights and duties of States towards one another" and to produce a complete geographic allocation of state jurisdictions. Carty traces these notions of normative and territorial completeness to two schools of European jurisprudence—the German historical school (e.g., Savigny) and the pure theory of law (e.g., Kelsen).

Carty associates these notions of completeness with a theory of the state as a legally ordered system of competences. This state theory, anchored in 19th-century European nationalism, relies upon an unsustainable jurisprudence. The law that orders its competences cannot also regulate its coming into being. Once the state exists, moreover, it cannot fully regulate the coming into being of the law if it is to remain a system of legally regulated competences. As a result, Carty argues, "the completeness of the legal order is nothing more than a hypothesis" (p. 10). International law must choose between its theory of the state and its comprehensive jurisprudential claims.

Several exemplary doctrines sharpen the contrast between state theory and jurisprudence. The inadequacies of self-determination doctrines developed to regulate the coming into being of international legal subjects expose international law's dominant state theory. Absent some doctrine relating the people and territory to the state (a relationship not sustained by self-determination doctrine), state theory must rely upon jurisprudence to complete the normative and territorial order of jurisdictions. Carty finds the doctrines that might establish these jurisprudential claims inadequate. Just as doctrines about self-determination signaled the inability of international law to regulate the coming into being of its own subjects, so also sources doctrine about *non liquet* signals the inability of legal subjects comprehensively to regulate the coming into being of their law. Similarly, doctrines about territorial jurisdiction, designed to complete the grid of sovereign authority, remain little more than "hypotheses" about a pattern of authority that must be established by states.

Carty's critical method is familiar and powerful. One identifies two elements of legal consciousness—here a theory of the state and a theory of

law—and demonstrates that each can only be sustained with the assistance of the other. One then demonstrates that those elements of each responsible for sustaining the other depend upon that which they were meant to support. Carty pursues this oppositional method in discussing doctrines about sources and territory. He argues that normative comprehensiveness depends upon institutional authorities and procedures that can develop gap-filling doctrine, while territorial comprehensiveness depends upon a complete and authoritative normative structure to regulate the jurisdiction of its subjects. To the extent that claims about normative comprehensiveness stem from the historical school while claims to territorial completeness can be traced to the pure theory of law, the opposition Carty identifies between state and legal theory is echoed within both legal theory and doctrine.

The direction of the critique is also familiar. By grounding a critique of law in its theory of the state and then undoing the theory of law, one leaves the reader with the state: debunking law to trumpet politics. Once Carty has critiqued international law's jurisprudential claims, his discussion of state theory is a mopping-up operation. We expect his conclusion that the international system is in some sense a state of nature.

Although the structure of Carty's critique is powerful whichever way one tells it, his indictment would have been far stronger had Carty forgone his conclusions about the "state of nature" and pursued his criticism somewhat farther. Instead, he adopts the familiar rhetoric of disciplinary "crisis" and "decay." This rhetoric is troubling both because it purports only to describe what it produces and because it shares with the discipline it criticizes a sense of "*après moi le déluge*."

Many readers might find Carty's statement that "international law is now assumed to be a complete system of law" (p. 10) difficult to comprehend. If Carty means normatively and territorially "comprehensive," his insistence upon absolute comprehensiveness seems too strong. Why not "comprehensive enough"? Gaps might merely offer the opportunity for further work. Perhaps he thinks that unless the system is absolutely complete, the theory of the state—the subject that will interpret and construct law—cannot be sustained. This may be true, although Carty does no more than hint at this relationship by vaguely associating "completeness" with "positivism"—a somewhat misplaced association, given his broader claims. Nevertheless, if comprehensiveness must be absolute to sustain the theory of the state, one wonders why we should not simply conclude that the international legal order is not yet finished.

These difficulties illustrate a common reaction to internal criticism. Why is the critic so insistent upon the absoluteness of the discipline's own claims when other scholars and practitioners are content to see the glass as half full? Carty might respond by elaborating the consequences of adhering to a framework that is flawed in this way—that seems erected upon the stilts of mutually unsustainable referents between state theory and jurisprudence—but he does not.

This question suggests another. To one used to thinking of law as the product of some human agency, it seems important to know *who* is assuming

international law to be one or another sort of system. I have never met an international lawyer or scholar who made the sort of assumptions Carty imputes to "international law." They seem to acknowledge and bemoan its incompleteness as a matter of course.

Carty might have responded by restricting his critique to the texts and materials of the discipline, or simply to the historical doctrines and texts that he studies, situating himself with others responding to gaps in the discipline's tools. On the other hand, he might have extended his critique by demonstrating that others rely upon claims that they explicitly deny, directly critiquing contemporary doctrinal work. Instead, he suggests that the claims about completeness that he criticizes characterize the work of certain 19th- and early 20th-century European scholars who continue to "influence" his contemporaries.

To substantiate this claim, Carty devotes part of each of the first chapters to demonstrating the continued doctrinal validity of positions associated with these schools. For example, in chapter 2 he argues that Article 38 of the Statute of the International Court of Justice must be seen "in the wider context of a broad attempt, following the first world war, to 'institutionalise' relations among States" (p. 14). He claims that the approach to sources taken by 19th-century writers "has had an influence which is not taken on board by Article 38" (p. 14), a claim he supports by tracing the roots of contemporary doctrine about treaties to "certain late nineteenth century discussions in Germany" (p. 15). This is an interesting insight of the sort that one happily finds throughout Carty's text. Its relationship to his critical project, however, is somewhat obscure.

He might be arguing that the vision of Article 38 is insufficient to the needs of modern theory unless supplemented by a respect for general custom incompatible with its positivist tenor, but he does not tell us enough about contemporary international legal theory to make this case. He stops after identifying some perplexing similarities between the historical school's approach to treaties and certain minority tendencies today. Having "illustrated" the importance of these early schools, he criticizes the tendency of all contemporary theory to differentiate the subjective and objective dimensions of custom and concludes that "international law is nothing more than the way that those who call themselves international lawyers look at international relations" (p. 21).

This conclusion is provocative and telling, unsettling not merely the positivist tenor of Article 38, but also those strands of contemporary doctrine that challenge and supplement that emphasis. At the same time, this conclusion seems to be an extension of the historical school's legal theory.

To criticize contemporary international law's continued separation of the objective and the subjective, Carty must read out of contemporary literature precisely the qualifications that might reasonably be traced to the historical school. Carty does not deal with the explicit rejection and qualification of Savigny's and Kelsen's work within both modern German jurisprudence and 20th-century international legal scholarship. Contemporary German legal literature treats the historical school both as one "factor" to be taken into

account in the interpretive process and as a description of law's general function as an expression of culture. The school's dogmatic claims have been both balanced against the insights of the pure theory school and relativized within a framework provided by the jurisprudence of interests and values. Carty might have developed a more direct assault on contemporary theory by showing that the relative influence accorded the historical school is incompatible with the more rigid doctrinal distinctions that it either defends or denies. In this way, he might have turned his own ambivalence about these materials against the discipline itself—reading it as a tension between its doctrine and theory.

Carty's ambivalence about the theoretical materials on which he bases his internal critique is familiar to critics who try to exploit a discipline's oppositions and ambivalences. But using one part of the discipline against another has a frustrating tendency to plunge the critic into self-contradiction. Having studied the historical school, Carty wants to establish the authority of his critical tools within the discipline and then use them against the discipline as a whole. The difficulty is that disciplines rarely give so much authority to their own tools.

Carty is much more convincing in close doctrinal work. Chapters 3 and 4 develop his criticism of general customary law and the law relating to territory. His analysis of 19th-century European treatises is broad ranging and reliable. He traces the origin of notions of normative and territorial completion in an emerging theory of national statehood. He grounds doctrines about general custom and jurisdiction in the *imagination* of 19th-century state theory, contending that they are the elaboration of a theoretical hypostasis rather than the functional elaboration of a set of new interactions among new state entities. This is Carty's most original insight.

If the basic thrust of Carty's argument seems sound, however, it is certainly easy to misunderstand. I do not think Carty would claim that nationalism demanded a particular approach to jurisdiction and custom. This seems too idealistic and Carty is silent on the mechanism of theory's tyranny. On the other hand, if he claims only that doctrines arose as creative responses to legal problems generated by nationalism, he sacrifices much of his critical bite, for other less "unrealistic" doctrines might accomplish the same thing. Carty tells us little about mechanisms of influence except in his choice of verbs. These doctrines "express," are "rooted in" or are "a projection of" a theory of the state.

After extending his critique of state theory and self-determination doctrine in chapters 5 and 6, Carty concludes by "applying" his insights to U.S. policy in Latin America, the Falkland Islands dispute and the Israeli invasion of Lebanon. Carty indicates that these sections resulted from the "prodding" he received "to work out the more positive implications of a general line of argument to which I have myself reacted rather negatively" (p. x). Unfortunately, these analyses emphasize his weakest points and abandon his strongest criticisms.

Rather than continuing a systematic critique of the doctrinal and theoretical foundations used to analyze these problems—extending his criticism

into contemporary literature—he brings along only his conclusion that states live in a “state of nature.” Separated from his earlier dialectical analysis, this seems commonplace. Much modern international legal theory, after all, claims that but for international law it *would* be a state of nature out there. Having just spent an entire book demonstrating the “decay” of scholarly attempts to construct a legal system on the basis of some image of a state by articulating the *continuing relationship* between legal and state theory, it seems very odd that Carty should abandon jurisprudence and assert the authority of state theory so insistently. The resulting analysis combines a somewhat exaggerated formalism about the law with the panache of vigorous realism—both ill-suited to the development of the “ideal discourse” Carty advocates.

Taken as a whole, I found Carty’s short book a good, stimulating read. His analysis of 19th-century international legal scholarship is interesting and well-done. Most fascinating, however, is his attempt to generate a dialectical critique within the international law tradition. Carty situates himself in our midst and weaves a complicated critique by opposing various strands of doctrine and theory he finds in our collective consciousness. If anything, he should have pressed his critique further. The discipline could use more such imaginative work.

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Grotius et la doctrine de la guerre juste. By Peter Haggenmacher. Paris: Presses Universitaires de France, 1983. Pp. xxiv, 682. Name index. F.270.

With the publication of his landmark treatise, *De jure belli ac pacis*, in 1625, Hugo Grotius laid claim to the title of Grand Master of public international law. His impact upon its subsequent development was extraordinary, and his influence in one form or another continues down to the present day.

Peter Haggenmacher, in a massive study of Grotian theory and the doctrine of the just war, claims that Grotius has often been misunderstood and, without question, wrongly perceived. For one thing, Haggenmacher asserts, Grotius’s seminal work was badly translated owing to the difficulties of coming to grips with a reputedly dead language. For another, the “baroque luxuries” of his citations confused more than they clarified.

Haggenmacher states at the beginning of his huge tome that *De jure* was not a study of natural law or of international law, but rather a treatise on the law of war. According to the author, the medieval commentators were caught up in theorizing about the right of legitimate defense. Thus, they were the precursors of the idea of the just war.

Thomas Aquinas is given credit for being the first classical contributor to the development of international law. It is with Aquinas, Haggenmacher asserts, that the theory of the just war begins its long journey to the modern day. Yet the claim is also made that “Grotius invokes entirely a foundation of Germanic and feudal ideas, supposing a kind of contract between government and people, equally submitted to a common law.” (The author’s style tends to be ponderously academic and occasionally bewildering.)

Haggenmacher concludes that Grotius did not himself believe that he was creating a new juridical system. In 1625, he wished merely to formulate a law of war. Grotius did not truly conceive of international law in the modern sense, and "in reality only completed and crowned the scholastic tradition of the *Ius belli*." His central intention was to place the tradition of the law of war upon a firm base and to determine objective rules of conduct. He actually owed much to his immediate predecessors.

The author then goes on to declare in a somewhat contradictory statement that no one has conceived more clearly than Grotius of an international law operating in "an autonomous and homogeneous juridical sphere." The Grotian contribution is described as that of "a general theory of extranational juridical conflicts." It was the genius of Grotius to provide a capstone for the past rather than to construct a signpost for the future. Thus, for Haggenmacher, the Grotian vision turns out to be "essentially static"; he left to his successors the delimitation of the basic principles underlying the modern rules of world order.

Like many dissertation writers before him, Haggenmacher finds it difficult to leave anything out of his richly detailed and overlong study. His book is divided into two parts, with 2,172 footnotes in part 1 and 996 in part 2, for a grand total of 3,168 footnotes (surely something of a contemporary academic record). Because of the wealth of detail found in this enormous treatise, distinctions and analyses are blurred rather than refined, or even defined. The author's rare attempts at humor (calling Thomas Aquinas "the angelic doctor") are misplaced. His style would be considered heavy in any language.

Haggenmacher has produced a highly technical treatise with extensive citations in almost every Western European language. His cautious, scholarly approach is encyclopedic in much of its treatment. There are contained within it really good nuggets of interpretation and information, which, unfortunately, have to be carefully extracted from an unwieldy mass of material. A book half the size would probably have had twice the value. Haggenmacher has given the reader everything that can be found on the subject and much more than one would really want to know or can meaningfully absorb.

ROBERT A. FRIEDLANDER

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Confrontation or Cooperation? International Law and the Developing Countries.

By R. P. Anand. New Delhi: Banyan Publications, 1984. Pp. xii, 274.

Professor Anand is one of a small number of Third World scholars who devote a lot of thought to the relationship of the newly independent countries to international law, particularly as regards their cultural heritage in this field and their contribution to the progressive development of the international legal system into an order that acknowledges and helps to overcome current injustices. This book is a collection of articles that appeared in various publications between 1970 and 1983.

Anand's study of the *Influence of History on the Literature of International*

Law shows that international law has always had to respond to the objective necessities of the day and describes how this has affected the thinking of legal scholars. Anand cites as a prominent example the emergence of the concept of freedom of the seas in reaction to claims made by Spain, Portugal and England to the exclusive control of sea spaces. He also shows how European international law came to predominate, at the expense of other regional systems, as a result of colonial conquest and imperialist domination in the 19th century. The last part deals with the transformation of international law since 1945 in response to greatly changed circumstances, in particular the emergence of more than a hundred new states with basically non-European cultural backgrounds.

The article entitled *Maritime Practice in South-East Asia until 1600 AD and the Modern Laws of the Sea* mostly deals with the general evolution of the law of the sea but also contains an interesting description of the legal situation and practices in the Indian Ocean prior to its being brought under the control of European maritime powers (pp. 56-60).

Sovereignty of States in International Law is a masterly presentation of the notion of sovereignty from its inception as a principle of municipal law designating the ultimate source of power to a concept of international law defining the relationship among independent states. It includes an interesting analysis of the Communist conception, according to which sovereignty only defines the position of states with respect to capitalist countries and hardly affects relationships among Communist countries (pp. 91-95). The current attachment of newly independent states to a rather absolute view of sovereignty is explained, as well as its impact on current international relations, especially within the framework of the United Nations. While acknowledging that sovereignty is still the basis of international law, the author pleads for a more cooperative approach to international relations, which would take due account of the interdependence of all members of the international community.

Anand's article on the "New International Economic Order" is a classic statement of the case for replacing the current international economic order, which was conceived by industrial nations for their own principal benefit, with a more just system. The 1974 Charter of Economic Rights and Duties of States is seen as a major step in this direction, and, while acknowledging that it is not binding in law, the author credits it with great persuasive value (pp. 115-16). A strong case is also made for producers' cartels (p. 122). Since the article was written, events appear to have moved in a somewhat different direction. Instead of waiting for improbable transfers from the industrialized world, developing countries are seeking closer cooperation among themselves in a new spirit of self-reliance, whereas producers' cartels, as well as other agreements to regulate the market for raw materials, have proved unable to cope with increasing surpluses resulting from overproduction or the collapse of demand, or both.

The article *Confrontation or Cooperation? The General Assembly at the Crossroads* relates the progressive emergence of a majority of Third World countries among the members of the United Nations and their attempts, during the 1970s, to impose their views by means of confrontational tactics in the

form of majority votes in the General Assembly. Some apparent successes achieved in this way may appear rather hollow when it comes to implementation, and the author himself pleads for more cooperation. In this he has been vindicated to some extent by the recent trend towards seeking consensus rather than imposing solutions by majority votes.

In *Development and Environment: The Case of the Developing Countries*, the author provides a vivid description of contemporary environmental problems and the potentially fatal results that disregarding them might produce. The dilemma of developing countries, which face both an acute need for industrialization and the imperatives of environmental conservation, is then pointed out. The author urges a compromise by which developing countries would be allowed to adopt less stringent standards of environmental protection in view of the fact that together they do not produce the amount of pollution found in the industrialized world. The article was written before the new emphasis on agricultural development became fashionable and before the disastrous environmental impact of many agricultural practices was fully realized.

In *The Politics of a New Legal Order for Fisheries*, the author mainly relates the reasons for and the stages of the emergence of the concept of the exclusive economic zone. He then shows that the legal existence of such a zone does not protect coastal states in the developing world from depredation of the living resources of their share of the seas, and urges them to cooperate both in exploiting their exclusive economic zone and in protecting it from encroachment from outside.

In his essay on *Mid-Ocean Archipelagos in International Law: Theory and Practice*, Anand defines the various types of archipelagoes before considering the early claims of the Philippines and Indonesia, and, more recently, of other archipelagic states. The evolution of legal thinking on archipelagoes at the UN Conference on the Law of the Sea up to 1976 is then analyzed.

After a brief glimpse at early instances of collective military forces in Anand's essay on an international police force, the author relates the failure of the implementation of the collective security system provided for by the UN Charter and then describes the various instances in which UN forces have been assembled on an ad hoc basis. He then presents the arguments put forward by those who advocate a permanent UN force and shows the tremendous obstacles such a project would have to overcome. The author concludes that such a force cannot be conceived under current conditions and suggests that the method of improvising on a case-to-case basis may still be the best.

All the articles are well thought out, beginning, in most cases, with a clear statement of the facts and, where needed, the historical evolution, before tackling the various legal and political problems at hand, in an attempt to reach a well-balanced and reasonable conclusion. Some pieces such as those on sovereignty and archipelagoes are brilliant presentations of complex issues and would make excellent reading for students and nonspecialists who would like to acquaint themselves with the subject.

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Mezhdunarodno-pravovoe znachenie odnostoronnykh juridicheskikh aktov gosudarstv (The International/Legal Significance of Unilateral Legal Acts of States). By R. A. Kalamkarjan. Moscow: Izdatel'stvo Nauka, 1984. Pp. 136. 80 kopecks.

As the author states (p. 6), there is no work in Soviet doctrine devoted especially to unilateral legal acts by states in public international law. Consequently, Western literature (Pfluger, Biscottini, Jacqué, Suy, Venturini, Di Vignano and others) is used almost exclusively and the judgments and advisory opinions of the PCIJ and the ICJ are also taken into consideration.

To one's relief, no quotations from the "classics" of Marxism-Leninism or from current Soviet leaders are offered in Kalamkarjan's book. There is no party jargon whatsoever. Passages from decisions by the PCIJ and the ICJ are quoted as sources of doctrinal inspiration, without any attacks or innuendo. In these respects, this short work is agreeable to read and is superior to the publications of most Soviet writers in the field of international law.

Kalamkarjan deals with four categories of unilateral international legal acts of states: recognition, promise, renunciation and protest. Sometimes he commits amusing errors such as referring to Shabtai Rosenne as a "Dutch scholar" (p. 69)—evidently because he published his monograph on the ICJ in Leiden (if such "criteria" apply, the present reviewer is also a Dutch scholar!). The book contains no bibliography, which is even more astonishing as it was published under the auspices of the Soviet Academy of Sciences. Western names are reproduced in Russian texts as they are pronounced—in this respect there are also inaccuracies when, for instance, Rubin is quoted as Rabin.

The work, which is probably the product of a junior academic, is strongly compilative. The author sometimes criticizes opinions voiced on individual issues by some writers. But frequently his criticisms, or the positions he takes, are not sufficiently justified, explained or documented.

This is particularly well illustrated by a short passage in which Kalamkarjan enters into a discussion of whether an act of renunciation by a state may include its own independence (pp. 88–89). Quoting, on the one hand, Pfluger (1936), who maintained that there are subjective rights of an absolute character that a state may not renounce under any circumstances and, on the other, Suy (1962), who thinks that there are no limits to renunciation,¹ he sides with the latter. He cites the possibility of joining another state on the basis of federation or autonomy (though the possibility of total submergence is not mentioned). "The main requirement in this case [he adds] is the necessity of a free expression of the will of the state."

However, one would expect that in the case of such a very fundamental decision—even if an authentically elected government represented the ma-

¹ Incidentally, E. Suy, in his *Actes juridiques unilatéraux en droit international* (1962), at pp. 168–69, did not develop this most important question, basing himself exclusively on the 1931 advisory opinion of the PCIJ in the *Austro-German Customs Union* case. But it is hard to deny that, since then, a whole era has passed and, in particular, ample historical experience has been amassed on how lethal such a carte blanche may be for the fate of smaller states (and peoples) confronted with the imperialistic aspirations and reckless manipulation of totalitarian powers.

jority of the population—it would be the *people* themselves that would decide in a totally free, preferably internationally monitored, plebiscite. After all, *they* are guaranteed the right to self-determination by the UN Charter and the UN Human Rights Covenants. Otherwise, one would have to accept what happened in the case of Estonia, Latvia and Lithuania in 1940, and in the almost forgotten case of Tannu-Tuva in 1944, by decisions of their “democratically elected” governments. Tuva, incidentally, was not even granted (until 1961) the status of an autonomous, let alone a union, republic within the USSR. Leaving the little-known case of Tuva aside, in the case of the Baltic states, not more than a few percent would have voted, in a free plebiscite, for incorporation into the USSR. This, even more so, as the large-scale terror and mass deportations, etc., demonstrated by the Soviets in Eastern Poland, “democratically” incorporated by them into the USSR in the autumn of 1939, were well-known in the Baltic countries.

If, say, the Government of Bulgaria (which was, allegedly, recently voted in by 99.91 percent of the total electorate, while the votes against represented only one-tenth of a thousand²) decided to ask to join the USSR, this would be perfectly in order, according to Communist doctrine.³ When, on the other hand, the people of Micronesia decided in plebiscites, declared by UN observers to have been free and fair, on free association with the United States or on Commonwealth status, the Soviet delegate to the Trusteeship Council spoke of “virtual slavery.”⁴ Of course, one has to bear in mind the absence, in this case, of the application of the principles of “socialist internationalism,” which, according to Communist doctrine, would change the situation radically.⁵ This “dialectical” aspect, as well as “socialist internationalism” itself, is, incidentally, not referred to by the author, for which he should be lauded rather than blamed.

What is most striking in the work under review is the minimal number of concrete examples given. Because there are not many cases concerning promise and renunciation, those that exist should have been collected and analyzed all the more. But in the sphere of recognition, and particularly protest, such cases are innumerable. Ample use should have been made of at least the pertinent acts of the author's own government.

This would help, for instance, to clarify some “grey areas,” such as whether the TASS declarations (*zayavleniia* TASS) published by the Soviet press and containing, e.g., condemnations, should be placed, for all practical purposes, on an equal footing with similar protests by the Soviet Government. One would like to hear a Soviet academic opinion as to why, for example, in one

² Cf. Pravda, June 11, 1986, at 4.

³ Such initiatives were allegedly demonstrated by the Bulgarian party leadership in the past, but apparently rejected by the Soviets as “premature.” However that may be, Todor Zhivkov, referring to the USSR, promised that his country will act with it “as one organism, which has one set of lungs and one blood system”; compare my *System of the International Organizations of the Communist Countries* (1976), at p. 152.

⁴ Cf. UNITED NATIONS NEWS DIGEST, Press Release No. WS/1291, July 3, 1986, at 5.

⁵ For a few critical comments on “socialist internationalism,” see my review of the East German *Voelkerrecht. Lehrbuch* (1981/82) in 78 AJIL 512-13 (1984).

and the same issue of *Pravda*,⁶ there is, side by side on the same page, a declaration by the Soviet Government protesting repression of Communists in Indonesia; and a declaration by TASS protesting American "undermining" of the SALT II Treaty.

By and large, the main shortcoming of the present work seems to be the fact that a topic that requires a much more detailed and deeper treatment was squeezed into some 130 pages, which is pathetically little. One wishes that the author would continue his studies and come up, in the nineties, with a comprehensive monograph in the field.

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Pravo Mezhdunarodnykh Dogovorov (The Law of International Treaties). By A. N. Talalaev. Moscow: Mezhdunarodnye Otnosheniia, 1985. Pp. 296. 2 rubles, 50 kopecks; \$6.75.

In the second volume of his treatise on treaty law, A. N. Talalaev presents views on a widely debated topic—the impact of treaties on nonsignatories. At a time when scholars in some countries are claiming that the provisions of the 1982 Convention on the Law of the Sea may be enjoyed by nonsignatories because they have passed into customary law, and those in other countries that the obligations established by the Convention have become universal *jus cogens*, Talalaev's monograph merits attention as an indication of trends in Soviet thinking on this debate.

Of course, the major part of the study is a restatement of the widely known provisions of the Vienna Convention on the Law of Treaties, but the book contains much of a novel character, for the author is liberal with commentary from Soviet authorities and practice. At the outset he states his creed that no state can gain rights or become bound to obligations against its will (pp. 66–67). He proceeds to reject the frequently heard argument that law is changing on this score because of Article 2(6) of the UN Charter, which seems to many to bind nonmembers to the obligation to live by its provisions.

To Talalaev, this paragraph must be interpreted as his senior colleague, G. I. Tunkin, and the Austrian scholar, A. Verdross, have argued, namely, that it does not go so far—rather, it is designed to require the United Nations as an entity and also its members to encourage nonmembers to act in accordance with the principles of the Charter. In this view, the obligation is placed on the Organization's members—not on nonmember states. Consequently, there is no reason in Talalaev's view to argue that Articles 34–38 of the Vienna Convention have weakened the sovereign rights of states. He holds firmly to the position taken at the outset by declaring again that no state can force a third state either to adhere to a treaty or to refrain from expressing its agreement with a treaty's provisions.

To this basic rule of sovereignty, there is an exception recognized by

⁶ Cf. *Pravda*, June 12, 1985, at 4.

many, including scholars of socialist states. It is the aggressor state. Under this exception, incorporated into the Vienna Convention as Article 75, an aggressor state can be bound by provisions to which it has not agreed. Talalaev cites the limitations placed on Germany by the peace treaties ending World War II, and the forced cession by Japan to the USSR of the Kurile Islands and southern Sakhalin by the agreements made by the Allies at Yalta and Potsdam. Of course, the author does not indicate that Japan has since argued that it is time to rectify a mistake in geography whereby the Habomai group of islands near Hokkaido was included wrongly within the Kuriles chain.

As to the extension of treaty privileges to nonsignatories, Talalaev admits that there are two views competing among scholars: (1) privileges can be conferred without a nonsignatory's consent; and (2) consent is required for extension of privileges. Following his penchant for sovereign choice in all matters of law, Talalaev indicates his preference for the second view, but he adds that he is willing to accept a presumption that unless a state rejects in writing rights conferred upon it as a nonparty to a treaty, the rights have been conferred effectively.

On the much discussed question of the effect upon customary law of codification, a matter recently discussed in the Judgment of the International Court of Justice in *Nicaragua v. United States*, Talalaev is clear. He has no difficulty in supporting a position like that later accepted by the Court, namely, that customary law norms remain in force after codification, independently of the treaty codifying them. As to the more difficult question of whether a specialized treaty's provisions can become obligatory for all states as custom, Talalaev reminds his readers that the Soviet delegation at Vienna took the position that this transformation can occur only if a nonsignatory signifies its acceptance of the norm. If that happens, in Talalaev's view, it would be incorrect to say that it is the treaty that binds the third state. Rather, it is the state's acceptance of the treaty norm as custom. As examples, he gives the Hague Convention on the Laws of Land Warfare, and various treaties on international rivers and sea routes (pp. 69-70).

On the broader question of a multilateral convention's impact on the whole world, Talalaev offers some qualifications to his conclusion that the convention binds all states—whether signatories or not. His qualifications are that the convention must have been signed by a preponderant majority of states; it must relate to a matter of worldwide concern; and it must include many customary law norms. Further, he seems to be concerned primarily with signatories who subsequently do not ratify. For these states, he argues that by their signatures they have consented to the existence of the norms, so that subsequently those states that would bind the nonratifier need not meet the usual requirement for proof of custom: they need not prove long-repeated unity of practice to establish the existence of the norm (p. 71).

Talalaev presents some of the Soviet diplomats' favored topics as candidates for this extension of multilateral conventions to the whole world. He speaks of treaties on disarmament and international security, of nonproliferation and nontesting of atomic weapons, and of the prohibition of bacter-

iological warfare. He is a realist, for he adds that, unfortunately, this extension to nonsignatories has not come about, but he thinks it ought to be made, and he cheers himself by adding that the refusal of statesmen to accept his view is not without advantage. If it were to be accepted quickly and widely, there would be no further need for struggle, and in his view, struggle is necessary until all states are bound by adherence. Even while awaiting such a turn of events, he will not let the matter lie. He suggests that nonsignatories have a moral duty to adhere to the principles enunciated by such treaties in their state practice. He then adds, perhaps wryly, that although there are many moral obligations that conform fully to norms of international law, that conformity does not alone convert morals into law.

Talalaev applies his thinking to the rejection by the United States of the 1982 Convention on the Law of the Sea. He analogizes the situation to the situation that has come into being since demilitarization and neutralization of the Antarctic by the Treaty of 1959, to which 32 states have adhered. He says all the world must respect the status of the Antarctic. He notes also the declaration by the Organization of African States in 1963 making Africa an atomic-free continent, a declaration that, in his view, all states must respect. So also, in his view, the Law of the Sea Convention "cannot and must not be ignored by any State, including the U.S.A." (p. 77). In support of his view, he cites the Soviet Government's declaration that the U.S. determination to mine the seabed is counter to the interests of the preponderant majority of states.

In Talalaev's study there is therefore to be found an expression of the often-repeated Soviet view that states are sovereign and, consequently, masters of their own destiny; but as law is developed in directions favored by Soviet diplomacy, Soviet scholars tend to move toward an expanded rule. One can but remember that when the USSR stood in the minority, its scholars sought always to keep the door open to permit refusal to accept an undesirable norm, but as it has moved with its neighboring socialists and the Third World into the majority, attitudes have changed. States are now being pressed to accept widely sponsored new law, which some Westerners have called "soft law," in the expectation on the part of Soviet scholars that as acceptance is broadened, "soft law" will become "hard law" to which all states must conform—even nonsignatories.

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Board of Editors

Introduction au droit des traités (2d rev. ed.). By Paul Reuter. Paris: Presses Universitaires de France, 1985. Pp. 211. Index. F.115.

Professor Reuter's well-known book is now available in a revised second edition.¹ Its 287 paragraphs and complementary notes give an overview of the many facets of the law of treaties. The book also reproduces the 1969

¹ See the review by H. W. Briggs at 68 AJIL 163-64 (1974).

Vienna Convention on the Law of Treaties and various texts adopted by the 1969 Vienna Conference, and contains a surprisingly detailed index.

Chapter 1 deals with the "conventional phenomenon" and has, in the main, not been altered. The author first depicts the historical evolution of treaties, with an emphasis on the periods between 1815 and 1914, between the two world wars and after 1945. There follows an interesting examination of a treaty's nature as a juridical act and a norm (and the implications of such a distinction, for instance, in respect of interpretation) and as a *traité-contrat* and a *traité-loi*. Reuter elaborates in some detail on his definition of a treaty, i.e., a manifestation of concordant wills imputable to two or more subjects of international law and destined to produce legal effects according to the rules of international law (para. 63). The definition appears sufficiently wide to accommodate unwritten and informal contracts and even gentlemen's agreements.

The second chapter continues with the conclusion and entry into force of treaties. The author explains the complexity of these rules as resulting from differing purposes of treaties, the specific nature of the state organs that conclude treaties and the varying number of parties. Further sections on the capacity of states to conclude treaties and on reservations have been revised and enlarged and now cover, for instance, the 1982 Law of the Sea Convention and the 1977 *Anglo-French Continental Shelf* arbitration.

The partly revised chapter 3 concerns the effects of treaties and contains important passages on treaty interpretation. They benefit greatly from the author's experience in the preparation of the 1969 Vienna Convention as a member of the International Law Commission and of the French delegation at the Vienna Conference. Thus, he correctly argues what even a literal interpretation of Article 31 of the 1969 Convention must surely disclose, namely, that that provision envisages a single combined operation of all the methods and elements mentioned therein. The section on the effects of treaties on third states draws attention to some implications of the 1974 *Nuclear Tests Cases*; it also studies the effects of treaties *qua* customary law and in the context of the succession of states. Last, the chapter analyzes the relationship of a treaty to other juridical norms, i.e., to other treaties and other sources of law, among the latter, *jus cogens*.

In the fourth chapter, on the nonapplication of treaties, the final section on international responsibility, namely, the consequences of a breach of treaty under Article 60 of the 1969 Convention, has been substantially revised.

In dealing with the subject, the author has emphasized the argumentative interpretation of the 1969 Convention and its *travaux préparatoires*; the subsequent state practice and case law stay somewhat in the background. As such, and in view of the author's clear structure and lucid style, the book indeed serves as an excellent introduction for newcomers to the subject. Beyond this, the book has become a classic and remains a valuable and stimulating starting point for scholarly work on the law of treaties.

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L'Intervento davanti alla Corte Internazionale di Giustizia. By Angelo Davi'. Naples: Casa Editrice Jovene, 1984. Pp. vii, 292. Indexes. English summary.

This book by Professor Angelo Davi' is an interesting and important study of third-party intervention procedures in disputes before the International Court of Justice. Davi' ably analyzes the relevant articles of the Statute of the Court, as well as its Rules and case law. The book will stimulate discussion and inquiry into the role of intervention procedures in developing the Court's dispute resolution potential and international norm-making power.

The author notes that intervention before the Court is possible under two articles of its Statute: (1) Article 63, which provides for "interpretative intervention" or "intervention arising out of a multinational treaty"; and (2) Article 62, which provides for the so-called intervention arising out of "a legal interest which might possibly affect the intervening party." Article 63 permits third-party states to intervene and essentially to offer amicus briefs to the Court regarding the interpretation of the multilateral treaties to which they are also parties. Article 62 deals with what American civil procedure would probably call intervention of right. That is, it involves disputes between two parties to which a third party is essential by virtue of having a claim that would be prejudiced by resolution of the dispute between the first two parties.

Since 1922, Article 62 petitions were actually filed only in the *S.S. Wimbledon*¹ and *Nuclear Tests*² cases. However, the Court did not reach the Article 62 intervention issue until 1981 and 1984 when it decided the two Libyan *Continental Shelf*³ cases. In three earlier instances, i.e., the *Eastern Greenland*,⁴ *Fisheries*⁵ and *Acquisition of Polish Nationality*⁶ cases, states had made known their intentions to intervene under Article 62, but actually did not.

Article 63 fared somewhat better. In the *S.S. Wimbledon* and *Haya de la Torre*⁷ cases, the Permanent Court of International Justice and the International Court of Justice, respectively, decided in favor of the admissibility of a "declaration of intervention" under Article 63, which requires the registrar of the Court to notify all states that are parties to a multilateral convention whose construction is in issue in proceedings before the Court. Such

¹ *S.S. Wimbledon* (UK, Fr., Italy & Japan v. Ger.), 1923 PCIJ, ser. A, No. 1 (Judgment of Aug. 17).

² *Nuclear Tests* (Austl. v. Fr.; NZ v. Fr.), 1974 ICJ REP. 253 and 457 (Judgments of Dec. 20).

³ Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, 1981 ICJ REP. 3 (Judgment of Apr. 14); Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, 1984 ICJ REP. 3 (Judgment of Mar. 21).

⁴ *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 PCIJ, ser. A/B, No. 43 (Judgment of Apr. 5).

⁵ *Fisheries case* (UK v. Nor.), 1951 ICJ REP. 116 (Judgment of Dec. 18).

⁶ *Acquisition of Polish Nationality* (Ger. v. Pol.), 1923 PCIJ, ser. B, No. 7 (Advisory Opinion of Sept. 15).

⁷ *Haya de la Torre* (Colom. v. Peru), 1951 ICJ REP. 4 (Order of Jan. 3).

states then may intervene as a matter of right if they agree to be bound by the decision of the Court regarding the interpretation of the treaty.

The introductory part of the book is followed by an analysis of the Court's two recent judgments denying applications to intervene under Article 62 filed by Malta and Italy in *Continental Shelf (Tunisia / Libya)* (1981) and *Continental Shelf (Libya / Malta)* (1984). This is followed by an exposition of the author's "integrated" or "unitary" concepts of intervention procedures under Articles 62 and 63.

The two Libyan *Continental Shelf* decisions are extremely important because the Hague Court, for the first time in its more than 50-year history, took a position on major questions relating to intervention under Article 62. These issues were left open by the Permanent Court at its inaugural sessions in 1922 and in the Rules of Court as adopted to the present time. Lack of clarity in the Rules was due to a divergence of opinion among the judges at the 1922 meeting that has continued to be unresolved.

Article 62 presents a jurisdictional peculiarity unique to international courts. It is also a peculiarity different from the situation regarding Article 63. It relates to jurisdiction over the parties. International courts generally have jurisdiction only by consent of the sovereign states that bring disputes to them and only to the extent to which those states grant the courts jurisdiction.

Under the Article 63 multilateral treaty interpretation provision, the jurisdictional requirement is more easily met. Under Article 63, the issue is the interpretation of the multilateral convention, with the third-party intervenor having an interest as a cosigner of the convention. It is interesting to speculate on the *stare decisis* effect that the decision of an international tribunal could have on the interpretation of a multilateral treaty. As some states signatory to the treaty may have civil law systems and other states may have common law systems, the *stare decisis* effect of a decision would be open to some dispute. Davi' does not seem really to address this question. In any event, the interest of third-party states in having a uniform interpretation of the multilateral treaty would seem on policy grounds to make the intervention fully justified, at least to the extent of submitting what is essentially an amicus brief.

The Article 62 situation concerning intervention is different. Two models are possible. The first would deny a third-party intervention on grounds that jurisdiction of the Court only exists by consent of the parties submitting the dispute. If the parties initially submitting the dispute did not consent to the intervention of the third party, then the Court would have no jurisdiction over the third party. The corollary of this view would be that the judgment of the Court would have no effect on the party that sought to intervene and whose intervention was denied by virtue of the failure of the initial parties to consent to it. The alternative model would be to permit the third party to intervene and then make the judgment of the Court binding upon it. The Court in its Libyan territorial waters decisions took the first view.

Professor Davi' wants to make Articles 62 and 63 subject to the same theoretical framework. That is, he wants the Court to be tough about accepting position briefs and appearances even in the Article 63 amicus mul-

tilateral treaty interpretation situation. Although this might serve the goal of creating a logically consistent framework, this result would not seem justified on policy grounds.

The book is tightly organized and fully discusses the relevant case law. It examines separate histories of Articles 62 and 63, although it does not use that history to justify separate theoretical treatment of these articles or different policy goals that might have been intended. In fact, the histories do justify *such separate treatment*.

The book has a detailed and useful English summary at the end. The translation is understandable but in some places extremely literal. It would have been worth the effort to have additional time spent in its preparation by someone whose first language was English, in order to make it more understandable and interesting to non-Italian, non-civil law lawyers.

The overall treatment by the Court and by Davi⁸ of intervention issues has been restrictive. John Miller has cogently placed the issue in its proper perspective as follows:

Encouraging states to intervene more often and more actively, and opening the Court to intervention by persons other than states will not make the Court more active. Only the build-up of a docket of contentious cases which affords reasonable opportunities for intervention can do that. But a more active participation by third states and an extension to non-states of the right to participate could make the Court more relevant in international litigation, and enable it to serve more effectively the causes of international peace and justice.⁸

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Verfahren und Völkerrecht. By Martin Limpert. Berlin: Duncker & Humblot, 1985. Pp. 259. DM 96.

Having in mind the highly developed law of procedure governing the process of legislation in constitutional states, the author of this Freiburg dissertation looks for corresponding international procedural law that regulates the establishment of (substantive) international law. In the author's opinion, the codification conferences convened by the UN General Assembly in performance of its task of encouraging "the progressive development of international law and its codification" (Art. 13(1)(a) of the UN Charter) constitute an especially important way of "setting international law"—a way appropriate to the current problems of the international community (p. 35). The work's subject is how law is "made" in those conferences.

In the first part ("International Lawmaking as a Procedural Problem"), Limpert gives, among other things, a detailed description of the conferences' preparation by either the International Law Commission (ILC) or another UN body, depending on the General Assembly's assessment of the codification task as a "nonpolitical" or a "political" one. The drafting of the 1969

⁸ Miller, *Intervention in Proceedings before the International Court of Justice*, in 2 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 550 (L. Gross ed. 1976).

Vienna Convention on the Law of Treaties and the 1982 Convention on the Law of the Sea is used to exemplify these two different forms of preparation. Limpert modifies the traditional view of international law scholars who hold that codification work "should be undertaken not by government delegates but by international lawyers working with a full measure of independence and on a purely scientific basis."¹ He pleads that the ILC be entrusted with "highly political codification projects" as well, because he considers its character—besides being scientific—as being political (pp. 121 *ff.*).

Continuing to use the examples given above, the author now describes in detail the procedure of both conferences (pp. 140–200). He contrasts the concentrated handling of a clearly delimited subject matter in Vienna with the "temporarily anarchic" procedure (p. 196) of the Law of the Sea Conference, which was burdened with the task of codifying all maritime international law and with irrelevant problems such as that of a "New International Economic Order." Limpert examines as the three typical elements of the latter conference's procedure the "overall package deal approach," the decentralized and informal procedure, and the consensual procedure.

In the second part ("International Lawmaking Procedure as a Problem of International Law"), the author examines the rules of international law regulating the codification conferences' procedure, as well as the influence of the current negotiations on international law and, finally, the consequences of unilateral acts of participating states during the negotiations.

Limpert succinctly develops the main problems of procedure in today's codification work under the auspices of the United Nations, but does not add much that is new to the large literature on the ILC² and on the Vienna and the Law of the Sea Conferences.³ His description, though not novel, is

¹ Hurst, *A Plea for the Codification of International Law on New Lines*, 32 GROTIIUS SOC'Y, TRANSACTIONS 135–53 (1946).

² See particularly Rosenne, *The International Law Commission, 1949–59*, 36 BRIT. Y.B. INT'L L. 104 (1960); H. W. BRIGGS, *THE INTERNATIONAL LAW COMMISSION* (1965); R. P. DHOKALIA, *THE CODIFICATION OF PUBLIC INTERNATIONAL LAW* (1970); R. THODE, *THE INTERNATIONAL LAW COMMISSION* (1972); and B. G. RAMCHARAN, *THE INTERNATIONAL LAW COMMISSION* (1977).

³ I will just mention the major works that concentrate on questions of procedure. For the Vienna Conference, see Daudet, *Note sur l'organisation et les méthodes de travail de la Conférence de Vienne sur le droit des traités*, 15 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [AFDI] 54 (1969); and S. ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* (1970). For the Law of the Sea Conference, see Eustis, *Procedures and Techniques of Multinational Negotiation: The LOS III Model*, 17 VA. J. INT'L L. 217 (1976/77); Treves, *Devices to Facilitate Consensus: The Experience of the Law of the Sea Conference*, 2 ITAL. Y.B. INT'L L. 39 (1976); Jaenicke, *Die Dritte Seerechtskonferenz der Vereinten Nationen*, 38 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 438 (1978); Vitzthum, *Friedlicher Wandel durch völkerrechtliche Rechtsetzung*, in VÖLKERRECHT UND KRIEGSVERRHÜTUNG 123 (J. Delbrück ed. 1979); Buzan, *Negotiating by Consensus*, 75 AJIL 324 (1981); Treves, *Une Nouvelle Technique dans la codification du droit international*, 27 AFDI 65 (1981); J. P. LÉVY, *LA CONFÉRENCE DES NATIONS UNIES SUR LE DROIT DE LA MER* (1983); and Eitel, *Die Bundesrepublik Deutschland auf der 3. UN-Seerechtskonferenz*, in DAS NEUE SEERECHT 15 (J. Delbrück ed. 1984).

worth our attention just because of the author's original question: Which norms of international law do determine the codification process?

Here the author cannot offer much more than Bernhardt did about 30 years ago;⁴ he still has to recognize that international procedural law is of a "quite fragmentary character" (p. 216). There are only the rules of the Vienna Convention on the Law of Treaties regarding the adoption of the text of a treaty and the invalidity of treaties, and the principles of the sovereignty of states and of legal protection for bona fide acts; that is all. These few rules, indeed, leave wide gaps that states can fill, especially by agreement on rules of procedure for each conference, including codification conferences as well as all the other bilateral and multilateral treaty negotiations. Limpert explains this modest result (rightly, the reviewer thinks) as deriving from the opinion of governments that international conferences are a diplomatic subject matter that should remain without a detailed legal order. Astonishingly enough, the author—while stressing the importance of formalized procedure for the formation of "right" rules (pp. 17, 248)—agrees with this opinion (pp. 216 ff.; compare pp. 244 ff.); accordingly, he abstains from proposing any further developments or improvements in international procedural law. What the reader now knows in regard to the different procedures discussed in the first part is that everything is equally permitted. Also, the second part (pp. 201–45) is very short compared to the first (pp. 20–200) and, while barely mentioning all the material in the first part, does not seem to exhaust its subject. For instance, the author could have examined more carefully the procedure of the Law of the Sea Conference (constituting a model for future codification conferences) in the light of the traditional concept of sovereignty.⁵ Furthermore, he might have dealt with specific situations in the course of codification to which the Vienna Convention rules apply or do not apply, which would make the further development of those rules necessary. It might also have been helpful and have broadened the basis of some of his statements if the author had continuously taken into consideration historical conferences and other UN codification conferences, like the Hague Peace Conferences of 1899 and 1907, as he did in the chapter on voting procedures (pp. 129–33).⁶

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⁴ Bernhardt, *Völkerrechtliche Bindungen in den Vorstadien des Vertragsschlusses*, 18 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 652 ff. (1957/58).

⁵ See Tomuschat, *Der Verfassungsstaat im Geflecht der internationalen Beziehungen*, 36 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 7, 30 (1978).

⁶ See R. G. GRUBER, *INTERNATIONALE STAATENKONGRESSE UND KONFERENZEN, IHRE VORBEREITUNG UND ORGANISATION* (1919); Y. DAUDET, *LES CONFÉRENCES DES NATIONS UNIES POUR LA CODIFICATION DU DROIT INTERNATIONAL* (1968); Sohn, *Voting Procedure in International Conferences for the Codification of International Law, 1864–1930*, in *JUS ET SOCIETAS: ESSAYS IN TRIBUTE TO WOLFGANG FRIEDMANN* 278 (G. M. Wilner ed. 1979); and Sohn, *Voting Procedures in United Nations Conferences for the Codification of International Law*, 69 AJIL 310 (1975).

The Evolution of Cooperation. By Robert Axelrod. New York: Basic Books, 1984. Pp. x, 241. Index. \$17.95.

This is an important book, with an elegant research design. For Axelrod, the fundamental problem is to understand how cooperation can emerge among self-seeking actors who lack centralized authority. This formulation has long been the crux of international relations theory, particularly "Realism," but Axelrod's approach breaks new ground and produces powerful answers to basic questions about international cooperation.

Axelrod relies on mathematical game theory, which he employs with great sophistication. Yet this book is fully accessible to nonspecialists. Axelrod writes clearly, in plain English, and always remains focused on the problem of how cooperation can emerge among egoists.

He starts by exploring a well-known game, the Prisoners' Dilemma, which represents many (but not all) of the obstacles to cooperation. In this game of strategic choice, there are only two players, each facing a single decision, to "cooperate" or to "defect." Each player must choose without knowing what the other will do. The payoffs for *each* player depend on the combination of *both* players' choices. The dilemma lies in the pattern of payoffs. In this game, if both players cooperate, each will do better than if they both defect. But what if only one chooses to cooperate while the other chooses to defect? In that case, the Prisoners' Dilemma rewards the defector with the highest possible payoff (even higher than the reward for mutual cooperation). The disappointed cooperator suffers the worst payoff, even worse than he would get if both players had defected. In colloquial terms, he is a "sucker." Cooperation still pays—but only if *both* players cooperate. This payoff structure creates powerful incentives to defect. In fact, for each player, defecting offers the best individual payoff *no matter what the other player does*.

If the players could make binding promises, then each would surely promise to cooperate if the other did also. But, by the rules of this game, there is simply no way to make enforceable threats or commitments, and no way to be sure what the other player will do on a given move. The result is a profound tension between individual rationality and collective rationality. If each player does what is best for himself, the result will be worse for everyone. Many, including Axelrod, see powerful analogies between this stylized game and the real world of international affairs, which also lacks centralized authority and where the narrow pursuit of national self-interest often produces results inferior to mutual cooperation.

The world of the Prisoners' Dilemma, with all its incentives to defect, is surely inhospitable terrain for the growth of cooperation. But that is precisely where Axelrod seeks to find it. Axelrod builds on the well-known proposition that cooperation in a Prisoners' Dilemma may be individually rational if the game is played repeatedly and if the end point is unknown. With that in mind, Axelrod sponsored a computer tournament and invited game theorists to submit their favorite strategies for an iterated Prisoners' Dilemma. The submissions specified what choice ("defect" or "cooperate") should be made in any game situation. Each strategy was then paired off with every other to see which performed best overall.

No single strategy—even the winner—can perform best under all hypothetical conditions. If all other players are “meanies” who continually defect, it pays to defect along with them. Under these circumstances, cooperation is fruitless and any attempt to cooperate will only yield a lower score. If, on the other hand, some other players are willing to cooperate, it may well pay to reciprocate. Whether it does pay depends upon whether the game is likely to continue and whether future payoffs from mutual cooperation are highly valued, compared to the immediate gains from defection.

In the tournament itself, the winning strategy was actually the simplest: “Tit for tat.” Using this strategy, a player cooperates on the first move and, from then on, replicates the opponent’s previous move. Tit for tat is initially generous, rewards an opponent’s efforts to cooperate, punishes defection immediately and stands ready to resume cooperation as soon as the other side proffers it. Because Tit for tat never defects first, it never outscores any opponent. But it scores quite well against a wide variety of other strategies—so well, in fact, that no other strategy had a higher overall score. One of Axelrod’s striking findings is that Tit for tat can succeed even if relatively few players use it, as long as they have a sufficiently high chance of interacting again. (Remember that it always pays to defect if you expect to meet a player only once. Cooperation pays if potential cooperators are sufficiently likely to interact and if future payoffs are not highly discounted.)

Using the tournament results and formal game theory, Axelrod draws the implications for individual choice: “do not be envious of the other player’s success; do not be the first to defect; reciprocate both cooperation and defection; and do not be too clever” (p. 21). Tit for tat succeeds in no small part because other players readily understand it and see that defection does not pay over the long haul. Axelrod also draws larger social implications, noting, for example, that cooperation can be fostered by making players’ interactions more frequent so that long-run considerations dominate.

Axelrod also draws important implications for diplomacy, particularly for U.S.-Soviet relations. But surely these implications must be tempered by a recognition that they derive from highly stylized games. The preferences in some U.S.-Soviet interactions may not replicate a Prisoners’ Dilemma. In some areas, the superpowers see little opportunity for joint gains. Also, U.S. and Soviet preferences may change over time, especially after turnovers in leadership. The payoffs themselves may be manipulated in bargaining. Moreover, unlike the contestants in the computer tournament, both superpowers are very much concerned with making threats, showing unshakable precommitments to specific choices and discovering the preferences and strategies of the other side. Even the assumption of a two-person game may be oversimple at times, especially when NATO policies are germane to superpower relations. Finally, in many cases, it is difficult to understand the diplomatic implications of a Tit-for-tat strategy. Axelrod himself refers to the 1979 Soviet invasion of Afghanistan, which, he says, “presented the United States with a typical dilemma of choice.” Even if we assume that the lessons of a Prisoners’ Dilemma game are relevant here, what would constitute a meaningful “tat” response?

There are obvious difficulties in drawing practical lessons from theoretical findings. Indeed, Axelrod's most recent work deals directly with such questions.¹ But the inevitable gaps between game theory and diplomatic interaction should not obscure Axelrod's genuine achievements. *The Evolution of Cooperation* is a fascinating book and a significant contribution to the study of international relations.

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Functionalism and Interdependence. By John Eastby. Lanham, New York, London: University Press of America; Charlottesville: The White Burkett Miller Center of Public Affairs, University of Virginia, 1985. Pp. xiii, 118. \$21, cloth; \$8.50, paper.

This is a well-written book that serves as a thorough introduction to functional theory and the ideas of its critics. The author has succeeded in distilling a number of important ideas into a short, readable text and in raising questions of significance to the lawyer involved in international organization.

Dr. Eastby assesses the impact of international organizations on the international political process in the light of the functional theory of David Mitrany. Mitrany's initial contention is taken to be that "social and economic co-operation between states will (and should) erode the 'ubiquitous' yet 'anachronistic' place held by territorial states in the modern world" (pp. 1-2), and that territorial nation-states no longer make their members happy and threaten to "warp the very civilization which they were meant to enhance" (p. 4). This crisis of the international system can be solved by "a devaluation of the State in favor of organized activities tailored to perform observable and specific functions" (p. 19). This should be done through "international organizations, both governmental and non-governmental, [which] are the primary means of international co-operative activities" (p. 89) and which, Mitrany argues, "are preparing the ground for the dissolution of territorial political government" (p. 88).

The author reviews and assesses what he considers to be the most important discussions of this theory and attempts to test it empirically by applying it to the performance of the United Nations Environment Programme (UNEP). The critique is divided into three parts. In chapter 2, the "Evaluation of Functionalism by American Political Science" is examined by reference to the writings of Hans Morgenthau, Inis L. Claude and James P. Sewell. Their principal critiques relate to functionalism's assumptions that political accord may be built on the basis of economic accord and that the parts of a whole can be created, organized and dismembered solely according to the criteria of need and efficiency. Moreover, they note the fact that within the United States both the rights of the states and economic individualism have prospered and continue to prosper. There is also the humani-

¹ See Axelrod & Keohane, *Achieving Cooperation under Anarchy: Strategies and Institutions*, in COOPERATION UNDER ANARCHY (K. A. Oye ed. 1986).

tarian perception that the rationalism inherent in Mitrany's vision raises questions as to whether a functional world can be a human world. In chapter 3, "The Reformation of Functionalism," the writings of Ernest Haas are explored. Particular attention is given to Haas's empirical criticism that there has been a failure to demonstrate that a regularized process of growth is inherent in functionalism. In chapter 4, Eastby conducts a "Re-evaluation of functionalism" through the work of Reinhold Niebuhr, with whose thoughts he aligns himself. It is at this point that Eastby questions functionalism's relationship to material and spiritual needs by suggesting that "it cannot be demonstrated that functionalism necessarily makes individuals happier" (p. 89). Furthermore, he challenges functionalism's assumption that people are irreversibly committed to trading their economic and political rights for economic security and doubts whether a universal society is attainable, or even desirable.

The work concludes with an examination of functional practice by reference to the UNEP. Eastby concludes that the practice of this organization neither validates conclusively nor invalidates Mitrany's argument, but suggests that he was not wrong in thinking that his theory needed to be both descriptive and prescriptive. UNEP was perhaps not the best organization on which to have focused: a study of the European Economic Community or the International Labour Organisation might have produced a very different conclusion, either way. What is more arguable is that international organizations have actually strengthened the notion of state sovereignty and that international habits of cooperation are developed by states with a view to reinforcing their internal legitimacy. A functionalist might argue that the speed with which the International Atomic Energy Agency sponsored, and states signed, two treaties on Emergency Notification and Assistance within 6 months of the Chernobyl accident¹ indicates the willingness of states to cooperate where their mutual interests allow. The cynic would argue that this predominantly reflects the desire of states to protect their own nuclear industries, and thus to safeguard the production of their domestic energy supply and enhance their industrial infrastructures, and that it is motivated by a desire to strengthen, and has the effect of strengthening, the internal legitimacy of the state and the barriers between states.

Eastby argues that functionalism may also be challenged on other grounds. It is possible that humankind may wish to remain committed to the nation-state and that the spiritual and material realms of the individual cannot be neatly separated, as functionalism suggests. He also questions whether we should be seeking to settle for a purely economic determination of the interests of the spirit. He concludes that Mitrany's argument has considerable sense but that it is questionable whether "interdependence" is transforming interstate relations: the processes of state making (or "nation-building") and

¹ 1986 Vienna Convention on Early Notification of a Nuclear Accident and 1986 Vienna Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency. Both Conventions were opened for signature on Sept. 22, 1986, and are reprinted in 25 ILM 1370 and 1377 (1986).

international organization continue unabated. The author sees this as a paradox, which it is not. The two processes are not mutually exclusive, but mutually dependent, as the state and the organization serve each other.

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Human Rights: From Rhetoric to Reality. Edited by Tom Campbell, David Goldberg, Sheila McLean and Tom Mullen. Oxford and New York: Basil Blackwell, 1986. Pp. 262. Index. \$45, cloth; \$19.95, paper.

Four members of the University of Glasgow School of Law, Tom Campbell, David Goldberg, Sheila McLean and Tom Mullen, have assembled a collection of essays on human rights. Although not always persuasive, this book is an interesting and welcome addition to the literature on this vital subject.

Chapter 2, "Constitutional Protection of Human Rights" by Tom Mullen, begins with a brief discussion of the debate in the United Kingdom over whether to adopt a bill of rights and empower the courts to invalidate acts of Parliament not in conformity with it. Mullen then examines U.S. jurisprudence of constitutional protection of human rights, cogently and succinctly criticizing various approaches to constitutional interpretation, with a view to determining what lessons can be drawn from the U.S. experience with judicial protection of human rights. Interpretivism, tradition, conventional morality, subjectivism and process-based theory are in turn found wanting. Interpretivism, the approach favored by the Reagan administration ("jurisprudence of original intent"), is difficult to apply, given that human rights provisions are often vague and general, and the legislative intent may be ambiguous and impossible to determine precisely. Moreover, such an approach precludes the evolution or growth of constitutional protection of human rights, and may not always be consistent with maximum protection of human rights. Tradition and conventional morality are too majoritarian to be sufficiently protective of human rights. Mullen rejects subjectivist legal realism as unnecessary and inferior to objective analysis. Process-based theory, which inquires whether the political process has malfunctioned, i.e., interference with participation or representation in the political process by means of restricting voting rights, or freedom of expression, and discrimination against minorities, is not as value-neutral as it purports to be; procedural rights, e.g., freedom of expression, can and should be considered substantive values, not merely "means" towards the end of ensuring the proper functioning of the democratic process. Counterarguments can certainly be made with respect to some of Mullen's criticisms, but he does succeed in pointing out that all the conventional theories of constitutional interpretation have serious flaws, although he does not consider an approach that would utilize elements from all the rejected theories, an approach fairly descriptive of the practice of constitutional interpretation.

Mullen argues that interpretation of human rights provisions should be

based on objective moral reasoning, which is designed to result in a rational informed consensus. Considerations of space do not permit a detailed discussion of Mullen's sophisticated and complex arguments relating to the potential objectivity of moral reasoning; suffice it to say that he concedes that the theories of objective moral reasoning referred to "are too open-ended to prescribe particular unarguably correct decisions" (p. 30) and, at best, such theories only ensure greater rationality in judicial decision making. This reviewer seriously doubts that moral reasoning can be made objective, but one can agree with Mullen that moral analysis cannot be absent from human rights cases. A less controversial analytical technique is the concept of the core (discussed in greater depth in ch. 3), which entails asking what the purpose of a particular right is. Citing allegedly incoherent U.S. case law relating to freedom of speech and the right to abortion, he argues that core analysis will result in clearer and more coherent decisions. Of course, core analysis does not provide easy answers, given that the precise contours of a "core" or the purpose of a right may not be self-evident.

Mullen is clearly sympathetic to the adoption of a bill of rights in the United Kingdom, but he does not give a conclusive opinion as to whether such a course of action is appropriate.

Esin Örücü, in chapter 3, "The Core of Rights and Freedoms: The Limit of Limits," argues in favor of applying "core" analysis to human rights, or, in other words, each right should be seen as possessing an irreducible minimum, an essential content that is inviolable and thus not subject to limitation or derogation.

Concomitant rights are necessary to effectuate the "core" right, e.g., the right to receive a passport is concomitant to the right to travel. Essential concomitant rights, like the core, are inviolable, but the circumjacence of a right is subject to limitation and derogation. This concept of the core is derived from the Basic Law of the Federal Republic of Germany and the Turkish Constitution of 1961. (The latter was superseded by the 1982 Constitution.) In both countries, the core concept generated a well-developed but incomplete body of case law, although a tendency to narrow the core was significantly greater in Turkey, where political violence was endemic in the late 1970s.

The concept of the core is a valuable one, as it seeks to check the infringements on human rights made by limitations and derogation. It is especially useful in the latter context, in that it serves as a reminder to policymakers that restrictions on derogable rights pursuant to a state of emergency must be limited and consistent with a democratic society. The concept is not incompatible with derogation, given that a valid state of emergency does not, as a matter of international law, entitle the state in question automatically to suspend or limit derogable rights; all such emergency measures must be justified by a showing of strict necessity. Örücü's essay would have benefited from discussion of some specific cases involving "core" analysis; defining the core of a right so as to avoid making it too broad or too narrow will be a difficult and controversial process.

In chapter 4, "Human Rights in a State of Exception: The ILA and the

Third World," Anthony Carty critically reviews the International Law Association (ILA) Minimum Standards of Human Rights Norms in a State of Exception. He criticizes the ILA's emphasis on treating political rights as nonderogable as irrelevant to Third World countries outside of Latin America, arguing that human rights violations in states lacking liberal democratic constitutions may be less severe than in states with such constitutions, contrasting Algeria with post-1976 Argentina. He goes so far as to assert that the ILA's emphasis on political human rights is dangerous inasmuch as it would authorize criticism and intervention by Western countries. Instead of applying Western concepts of political rights to non-Western societies, he argues that it is preferable to interpret human rights obligations in light of the traditions and political culture of individual countries, applying sociological and cultural anthropological analysis.

Although the ILA's insistence on the nonderogability of political rights may appear to be an academic exercise with respect to the Third World, given the frequency of coups and the durability of authoritarianism in many such states, it is not for lawyers concerned with human rights to acquiesce in or place an imprimatur on such authoritarianism, which facilitates persistent and severe violations of human rights. The presence of a liberal constitution does not immunize a state from authoritarian takeovers, which may produce gross violations of human rights, as in Argentina, but, to the extent that such a constitution reflects the political culture of the country, it is possible to hope for a return to democratic rule, as was indeed the case in Argentina in December 1983. (In contrast, Algeria remains mired in authoritarian rule.)

Carty's strictures regarding Western criticism of the lack of political rights in many Third World countries are particularly unconvincing; such rights are incorporated in the International Covenant on Civil and Political Rights, and it is rather late in the day to argue that criticism of a state's human rights violations is impermissible intervention. (His assertion that one-party states are permitted by the Covenant is questionable.) Carty is correct in stressing the gap between the liberal democratic rhetoric of human rights lawyers and the realities of political life in many Third World countries; nevertheless, democratization is the most certain means of terminating gross violations of human rights, rather than the amorphous alternative anthropological and sociological framework that he proposes.

Noreen Burrows, in "International Law and Human Rights: The Case of Women's Rights," contends that much recent international legislation pertaining to women's rights has been one-sidedly focused on eliminating discrimination and facilitating female entry into and participation in traditionally male-dominated spheres of life, and has not sufficiently taken into account the different functions performed by women, i.e., reproduction, child care, housework and subsistence agriculture in many parts of the world. Greater recognition must be paid to the woman's role in the family and household, the unequal burdens of which necessitate acknowledgment of specific women's rights. Such rights are not inconsistent with the antidiscrim-

ination approach, given that certain spheres of life, undervalued by men, will still be occupied by women.

As with international law in general, enforceability is a serious problem for international human rights provisions regarding women. Implementation of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, like that of the International Covenant on Economic, Social and Cultural Rights, is progressive; even worse, international human rights instruments often enjoy only weak enforcement mechanisms, i.e., reporting requirements and/or complaints by one state against another. The 1979 Convention only provides for reports; the strongest mechanism, permitting complaints against a state by its nationals, is not utilized.

Burrows's thesis that international law has not recognized the need for "women's rights," as opposed to simply prohibiting discrimination, is overstated and is contradicted by her references to provisions of the 1979 Convention guaranteeing maternity rights, e.g., rights to maternity leave and to special protection for pregnant women in dangerous work. Nevertheless, this criticism is substantially justified, although certain aspects of the problem may not be amenable to legislative action, i.e., legislation mandating greater male participation in child care and housework is unrealistic and inappropriate. (Of course, inequitable sharing of such duties could be deemed a ground for divorce in states lacking no-fault divorce.) Burrows is quite correct in asserting the need for stronger enforcement mechanisms, but in a world of nation-states jealous of their sovereignty, the obstacles to achieving this are great, albeit not insurmountable with regard to every state.

In chapter 6, "The Right to Reproduce," Sheila McLean argues for recognition of the right to reproduce, the core of which is the individual's "liberty to make free choices about whether or not to reproduce" (p. 101). However, this core is not absolute insofar as states may legitimately restrict abortion to protect the lives of viable fetuses. Tracing the historical evolution of the right to reproduce, she points out, paradoxically, that limited recognition of this right, i.e., the legalization of birth control, proceeded hand in hand with its violation on a massive scale, i.e., widespread involuntary sterilization of the feeble-minded, mentally ill and mentally retarded in the United States, under the influence of the eugenics movement and with the blessing of the U.S. Supreme Court in its infamous decision in *Buck v. Bell*.¹ Although involuntary sterilization on this scale has fallen into disfavor since World War II, U.S. case law has not gone so far as absolutely prohibiting involuntary sterilization of mentally defective individuals, despite the clear recognition of the right to reproduce in abortion and birth control cases.

This reviewer does not take exception to McLean's assertion of a right to reproduce, but her definition of the core of the right should be stated in a somewhat narrower and more qualified fashion, considering that she does not believe that it is illegitimate for the state to restrict abortion where the fetus is viable. Moreover, an absolute prohibition of involuntary sterilization

¹ 274 U.S. 206 (1927).

would not be a desirable or humane public policy; rigorous judicial control, both procedurally and substantively, will preclude a return to the "bad old days" of *Buck v. Bell*.

Professor Campbell's chapter on "The Rights of the Mentally Ill" makes the interesting counterlibertarian argument that civil commitment of the mentally ill on the ground of danger to others (police power) is discriminatory insofar as dangerous individuals who are not mentally ill and not charged with a crime are not similarly subject to detention, with the limited exception of quarantines. Adopting an avoidable suffering model of human rights, he expresses greater sympathy for *parens patriae* commitment (danger to self). Such detention is consistent with the rights of the mentally ill, in contrast to police power commitment, which is pursuant to the public safety. However, he concedes that paternalistic commitment on welfare grounds may be abused, and he proposes that nonvoluntary treatment in cases of *parens patriae* commitment be permitted only for the relief of "extreme avoidable suffering" (p. 145). Relief of suffering should be given priority over self-determination in appropriate cases.

Campbell's thought-provoking analysis is not persuasive with regard to its opposition to police power commitment as discriminatory, to the extent that such commitment is predicated on overt acts manifesting a very real danger to others, and is accompanied by rigorous procedural safeguards. His "avoidance of suffering model" is more convincing and is a welcome antidote to the excessive libertarianism that characterizes much of the legal writing on the subject. No doubt, some will consider talk of a "right to be treated against one's will" (p. 142) to be newspeak, but we see on our streets every day the tragic results of excessive libertarianism in this area. Campbell's model is not inconsistent with procedural due process or, in some cases, tightening up criteria for involuntary treatment. He correctly views human rights as entailing "positive duties of states to provide for the welfare of their citizens" (p. 144).

Sheila McLean, in "The Right to Consent to Medical Treatment," chapter 8, argues that requiring informed consent as a prerequisite to medical treatment logically flows from the right of self-determination and personal autonomy. Subject to certain exceptions, it is not disputed that therapeutic procedures require the consent of the affected patient, but whether such consent must be preceded by reasonable disclosure has been the subject of lively controversy in the medical and legal communities. McLean contends that, without disclosure, consent is morally and legally dubious, as such consent is not an exercise of real choice. She argues that disclosure should encompass all known risks and potential benefits, being limited neither to such disclosure as is customary, nor to what a reasonable patient would expect, i.e., "material" risks. According to this point of view, the landmark case, *Canterbury v. Spence*,² did not go far enough inasmuch as it did not require full disclosure. Courts in other common law countries have been much more deferential to physicians, rejecting the concept; the common

² 414 F.2d 772 (D.C. Cir. 1972).

trend toward treating cases alleging lack of consent as negligence actions has made it more difficult for plaintiffs to prevail in this type of case.

Consent to medical treatment should certainly be preceded by disclosure, but the full disclosure standard proposed by McLean would be impracticable, given the plethora of hypothetical risks in any medical procedure. The *Canterbury v. Spence* standard of requiring disclosure of risks that a reasonable patient would wish to be informed of is more reasonable and is thus to be preferred. McLean does not discuss the "therapeutic privilege" exception to informed consent, which permits such disclosure to be omitted where it is likely to have a detrimental effect on the patient's health; in some cases, nondisclosure might be appropriate as necessary to prevent the patient from acting irrationally to the detriment of his or her health. Also, it is not clear that a patient should not be allowed explicitly to waive informed consent.

"The Right of Public Assembly and Procession" under British law is discussed in chapter 9 by Jim Murdoch. He convincingly argues that the absence in the United Kingdom of a written constitution places such rights on a far weaker footing than in countries where such rights are enshrined as part of the supreme law of the land. The lack of a bill of rights has resulted in insufficient judicial sensitivity to human rights; in this context, public order is given substantially greater weight than the right to public protest, and the balance is almost always struck in favor of public order or convenience. Murdoch does not argue that the right of public protest should be absolute, but he points out that U.S. cases evince greater concern than in the United Kingdom for protecting the rights of public assembly and procession, making the scales more evenly balanced. While the British judiciary has been somewhat more sympathetic to public processions, given that they can be viewed as consistent with the right of passage on the streets, statutes and local bylaws have restricted this right. The "heckler's veto" can put the organizers of an assembly or procession in the dock for breach of the peace, notwithstanding their intentions—certainly a deterrent to controversial demonstrations. More attention to practice would no doubt make the picture less bleak, but Murdoch is right in arguing that human rights should not be left to the mercy of the local authorities, or a majority of Parliament, or even the courts, insofar as they have created common law crimes impinging on the right to public protest.

In "Human Rights and the Criminal Process," Gerry Maher argues that in the United Kingdom, debate regarding the criminal process has been impoverished by a lack of reference to human rights, a consequence of utilitarian and positivist views that are almost exclusively concerned with efficiency, i.e., accuracy of fact-finding.

As an example of this attitude, Maher cites the Thomson Committee on Scottish criminal procedure, which recommended that the police be empowered to detain individuals for up to 6 hours for questioning without having to arrest and charge them formally, as opposed to the widely ignored law at the time, which required that arrested individuals be charged simultaneously. Public ignorance benefited the police insofar as individuals who had not been formally arrested and charged stayed in police custody; the

committee recommended legalizing this practice without giving adequate consideration to the right to liberty.

Another example involves the discussion of the right to silence contained in the report of the 1981 Royal Commission on Criminal Procedure in England and Wales, which recommended against restriction of the right on purely utilitarian grounds, i.e., to avoid an increase in false confessions. Future utilitarians may come to different conclusions regarding this right, which is more strongly supported by a human rights rationale.

Maher argues that the human rights approach is preferable to *ad hoc* balancing; the criminal justice system possesses the awesome power to deprive an individual of his liberty or even his life, and so human rights have a very important role to play in the criminal process.

Maher's critique of utilitarian, instrumentalist views of the criminal process is incisive and very timely, given the current popularity of such modes of thought, which can be said to underlie opposition to the exclusionary rule. Although this book was published in 1986, Maher's essay does not mention the Police and Criminal Evidence Act of 1984, a codification of the law of arrest, search and interrogation in England and Wales that, *inter alia*, provides for detention without charge for up to 96 hours, and for *incommunicado* detention under certain circumstances. It would be helpful if Maher had compared British criminal procedure with that of a jurisdiction that takes a less utilitarian and more human rights-oriented approach.

Elsbeth Attwooll, in chapter 11, "The Right to Be a Member of a Trade Union," asserts that the core of the right to trade union membership is "joining and continuing to belong to any combination of any type in support of economic interests held in common with other types of workers" (p. 226). Essential concomitant rights would include the right to withdraw labor, and the right to engage in political activity in support of common economic interests. Of course, recognition of this right presupposes a right to establish trade unions as well as autonomy for such organizations.

Attwooll strongly emphasizes the latter, criticizing reforms enacted by the Conservative Government that, *inter alia*, require that secret balloting be used in union elections, strike calls and referendums regarding political funds. In a similar vein, she also denies a right not to join trade unions, likening them to professional membership organizations in which it is necessary to practice the profession. Attwooll provides discussions of the evolution of trade union rights under British law, and ILO case law relating to such rights.

Attwooll gives too much weight to the rights of trade unions and too little to those of union members and nonunion workers. The analogy to professional organizations is inapt because such quasi-public organizations regulate their members and are encharged, by law, with the responsibility of denying entry into the profession to those who are not deemed qualified. To require accountability of union leaders to their rank and file does not necessarily impinge upon trade union rights. Of course, restrictions on union autonomy to assure "democratization" may be so unreasonable as to render such objectives pretextual.

A few general criticisms of this book can be made. First, some of the chapters pay little or no attention to international human rights law, and thus ignore relevant case law of the European Commission on Human Rights and the European Court of Human Rights. Second, the concept of the core, one of the themes of the book, is not fully developed or always carefully applied. On a less important note, it would have been useful to provide the customary terse biographical note on each contributor and to indicate the date the papers were prepared; in at least two cases, an important pre-1986 development was not referred to in the text.

Nevertheless, notwithstanding the above caveats, this book is a valuable addition to the literature on human rights, discussing relatively obscure rights, e.g., the right to consent to treatment; and if it is not always persuasive, then, at the very least, it is provocative and stimulating. An American reader cannot fail to be struck by a theme found in many of the essays: U.S. case law evinces greater respect for human rights than UK case law, presumably because of the American tradition of human rights as fundamental norms, rather than as liberties that can be abridged by a majority of the legislature. It is to be hoped that this book will stimulate interest in the adoption of a bill of rights in the United Kingdom; that would be a fitting event to mark the tercentenary of the Glorious Revolution.

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Essays on Human Rights in the Helsinki Process. Edited by A. Bloed and P. van Dijk. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xiii, 266. Dfl.145; \$49.75; £40.25.

This collection of essays, edited by two Dutch legal scholars from the Europa Instituut of the University of Utrecht, concerns the negotiating process, outcome and legal implications of the 1980-1983 Madrid follow-up meeting to the Conference on Security and Co-operation in Europe, which culminated in the 1975 Helsinki Final Act. The nine essays, written by Dutch scholars and diplomats, focus on aspects of the meeting relating to human rights and humanitarian concerns. The volume results from an initiative of the Helsinki Group of the Netherlands Committee of Lawyers for Human Rights, the Dutch branch of the Geneva-based International Commission of Jurists. It contains much useful information not easily available elsewhere and provides the American reader with a Western European perspective on human rights and the Helsinki Accords. It is essential reading for all interested in the Helsinki process.

The editors note that the Madrid meeting "disclosed signs of some development and progress" in the area of human rights and cite new commitments on human rights and in the humanitarian field in the Concluding Document. Later meetings, in Ottawa in 1985 and Bern in 1986, concerning human rights and human contacts in the context of the Helsinki process,

have not, unfortunately, given reason for continued optimism. However, the recent successful conclusion of the Stockholm Conference on Confidence and Security-building Measures and Disarmament in Europe augurs well for a reduction of international tensions and may create a better climate for progress in human rights and humanitarian concerns. Considering the international situation at the time of the Madrid meeting—the invasion of Afghanistan, the declaration of martial law in Poland and the shooting down of the Korean airliner—it is remarkable that a Concluding Document was agreed on at all.

Thirty-three European nations and the United States and Canada signed, in Helsinki in 1975, the Final Act on Security and Co-operation in Europe. It is not a treaty, but a political document dealing particularly with European security and cooperation in humanitarian and other fields. Although most of the attention focused on the Helsinki process has related to human rights, the provisions on security and cooperation in other areas are also of great importance. It was decided at Helsinki to have follow-up meetings among the signatories to permit an ongoing exchange of views on the implementation of the Final Act. The first meeting was held in Belgrade in 1977–1978 and led to no substantial results. The Madrid meeting, which lasted from September 1980 to September 1983, was the second follow-up meeting and equaled in length the original meeting, which had led to the Final Act.

The first four chapters of this volume treat general aspects of the Madrid meeting and East-West relations concerning human rights. The next five chapters are case studies of particular aspects of human rights within the Helsinki context: trade union freedom in socialist states, the right to work in East and West, working conditions of journalists in Eastern Europe, the jamming of foreign radio broadcasts and the boycott of the 1980 Moscow Olympic Games following the invasion of Afghanistan. Annexes include the Concluding Document of Madrid, a number of proposals submitted at Madrid on human rights and humanitarian matters, a 1950 UN General Assembly resolution on interference with radio signals and the agreement relating to cooperation between sporting organizations in the USSR and the Netherlands.

The first chapter, on "Détente and the Concluding Document of Madrid" by Arie Bloed, points out the divergent Eastern and Western conceptions of détente and the increasing realization by Westerners that their "idealistic view" of détente does not fit in with the Eastern conception or with reality. Bloed provides a short summary of the main aspects of the Concluding Document. The criticisms of human rights in the Soviet Union and in Eastern Europe by Western delegations, voiced frequently during the Madrid meeting, are not reflected in the Concluding Document, but disillusionment with the Helsinki process is evidenced by clauses voicing concern over failures of implementation of the Final Act. The Document notes, however, the significance of human rights and stresses the determination of the signatory states to promote and encourage human rights and fundamental freedoms. New elements in the Document are the inclusion of provisions on trade union freedoms, free access to embassies and consulates, and some improved

agreements on family reunifications and marriages between citizens of different states. The inclusion of the provision on trade union freedoms is exceptionally significant in view of the situation in Poland. A provision strongly desired by the West concerning the right to form Helsinki monitoring groups was not included because of Eastern European opposition. The ongoing nature of the Helsinki process was reaffirmed by the decision at Madrid to organize the Ottawa conference on human rights and fundamental freedoms in 1985, mentioned above, and a meeting of experts on human contacts in Bern in 1986. Although it does not relate directly to human rights, the decision taken at Madrid to organize the Stockholm Conference on Security in Europe, now successfully concluded after lengthy negotiations, is of importance in the context of the creation of a more positive climate between East and West—necessary for any substantial progress in the humanitarian field. Finally, the participating states agreed at Madrid that the third follow-up meeting should begin in Vienna in late 1986.

Harm J. Hazewinkel of the Dutch Ministry of Foreign Affairs prepared the second chapter on "The Madrid Meeting 1980-83: An Eyewitness Account." He refers to the Madrid meeting as "one of the more remarkable international meetings of the second half of the twentieth century," not because of the results but because of the way the results were attained. Ample evidence is provided of the excruciatingly slow negotiations, constantly complicated by international events. The Soviet invasion of Afghanistan not long before set the unfavorable stage for the meeting. Persons interested in conference diplomacy will find this detailed account of the lengthy negotiations useful. One can only sympathize with the delegates, roasting in the hot weather of Spain and enduring mutual recriminations, successive international crises including the Polish situation, arrests of dissidents in the USSR and the downing of the Korean airliner, and the inordinately long negotiations. The West's insistence that the Final Document contain references to human rights and Eastern European efforts to avoid such references stretched out the proceedings. In the end, neither bloc achieved all of its objectives, but the previously cited results of the meeting ensured that the Helsinki process would, at a minimum, continue to involve exchanges on human rights and human contacts.

The chapter on "Some Aspects of the Socialist View of Human Rights" by Arie Bloed and Fried van Hoof of the Europa Instituut provides a useful summary of the divergent views of human rights evidenced at every stage of the Helsinki process. The term "socialist" in the title refers only to the socialist countries of Eastern Europe and the Soviet Union. Extensive references to socialist literature in German and Russian authenticate this essay on Soviet views.

Chapter 4 on "Human Rights and Non-Intervention" by Arie Bloed and Pieter van Dijk mainly duplicates treatment of the subject developed elsewhere, particularly by Louis Henkin.¹ Bloed and van Dijk find that the Ma-

¹ Henkin, *Human Rights and "Domestic Jurisdiction,"* in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 21 (T. Buergenthal ed. 1977).

drid meeting did not lead to any breakthrough in the continuing controversy between East and West over the relationship between human rights and nonintervention. Both sides stuck to their traditional conceptions. Slight movement could be detected in the Eastern view since the USSR showed some flexibility regarding exceptions to nonintervention that the East was willing to accept. The Soviet view has been that only gross and massive violations of human rights such as apartheid, fascism, colonialism, genocide and racial discrimination may be discussed at the international level. At Madrid, "unemployment" was added to the list. "Although this was clearly introduced to legitimize the Eastern attacks on the West in this field, it showed at the same time that the list of Eastern exceptions to the non-intervention principle is not limited" (p. 71). The authors make the thoughtful suggestion that a reporting system on implementation of human rights in the participating states be adopted as part of the Helsinki process. Such a system would be similar to those set up under international treaties such as the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination and procedures for supervision of international labor conventions. Bringing up concrete cases of alleged human rights violations in the Helsinki process is not useful, according to Bloed and van Dijk. It resembles procedures for interstate complaints provided for in some international treaties where there has been explicit acceptance of the procedure by signatory states. They point out that "the socialist States have always taken a very reserved attitude towards complaint procedures. It should definitely not be assumed, therefore, that a similar procedure is implicitly provided for in the Fourth Basket of the Final Act" (p. 73). But Eastern states have complied with obligations for reporting required by international treaties that they have accepted. The authors consider that the section of the Helsinki Final Act providing for "a thorough exchange of views on the implementation of the provisions" can be analogized to the reporting procedures of other international instruments. They suggest that future follow-up meetings consider the possibility of procedural arrangements for the presentation of reports on the implementation of the human rights provisions. Such reports would be general statements on the overall implementation of the Final Act. The formalization of such a procedure would have a favorable effect on the overall climate during future negotiations and "in this way the participants would at any event undoubtedly remain within the scope of international law and the commitments as laid down in the Final Act" (pp. 74-75). The approach of some Western delegations, which consists of lengthy accusations of violations of the human rights of specific individuals by the socialist countries, is extremely irritating to Eastern countries and does not advance human rights, according to Bloed and van Dijk.

Although it is clear that such violations cannot in any way be justified and therefore are not to be tolerated, one may still wonder whether the approach chosen by some delegations in Belgrade and Madrid is so efficient after all, at least if one assumes that it really was prompted by humanitarian and not by general political motives [p. 75].

Standing up publicly for individual subjects of other states, "even though this may result in an improvement of their personal conditions, need not by any means have a positive effect on the situation of the population as such in the country concerned" (*id.*).

The authors' view that "silent diplomacy" is a more effective method of dealing with human rights violations in Eastern countries under the Helsinki process is highly controversial. To some observers, such a suggestion would deprive the Helsinki process of its most important value as an international forum where individual violations may be publicly aired in the presence of Eastern European delegations with full media attention. And, certainly, individual dissidents who have been aided by public criticism of human rights violations will not agree with the authors. Nevertheless, the suggestion of a more formalized reporting system under the Helsinki process, as a method of replacing the polemic nature of most of the human rights exchanges at Helsinki conferences, deserves serious consideration. Perhaps, the time has arrived for a different approach.

The most original essays are the chapters by Ger P. van den Berg, senior lecturer in East European law at the University of Leiden, on "Trade Union Freedom in Socialist States and the Madrid Meeting; with Special Reference to the Soviet Union," and "The Right to Work in East and West" by van den Berg and René M. A. Guldenmund. This information is not easily obtainable elsewhere. The chapter on trade union freedom in socialist states contains detailed analyses of Soviet legislation on trade unions, but, more interestingly, it also reports on the diverse views of Soviet legal scholars concerning trade union freedom in the socialist system. This carefully documented, technical study is of particular interest to all interested in labor and Eastern Europe.

The chapter on "The Right to Work in East and West" is the only chapter that deals with obligations of the West under the Helsinki Accords.² Eastern Europeans have frequently criticized the West for its failure to implement the right to work and cite extensive unemployment in the West as a violation of human rights. The authors undertake an analysis of the right to work as a human right, including a survey of international provisions, consideration of the content and legal nature of the right to work, legal implications of the right, beneficiaries and addressees of the right and the obligations implied in the right. They note that given

the great importance Western delegations attached to the human rights issue, the discussions on the right to work were definitely not a shining example of a sound participation of Western States in the legal debate. Instead of a well prepared, clarifying discussion on the basis of a clear-cut Western legal concept of the right to work, the issue led to a puny, confused argument of embarrassing insignificance [p. 114].

Replies of Western delegations to accusations that the right to work was violated in the West were "rather superficial and unconvincing" (*id.*). West-

² The "right to work" in this context does not, of course, mean the same as the narrow sense in which the term is normally used in the United States. It refers internationally to the right to freely chosen employment.

ern countries do not take the right to work seriously as a human right or as a standard for internal policy. The authors maintain that the Western approach does not accord with international obligations that a number of Western countries have accepted, and that Western states have not yet adopted an integrated approach to human rights.

The remaining chapters on working conditions for journalists, the jamming of foreign radio broadcasts and the boycott of the 1980 Moscow Olympic Games are of less interest since the information contained in them is more easily available elsewhere. The chapter on working conditions for journalists draws extensively, for example, on the semiannual reports of the U.S. State Department on the implementation of the Final Act.

A number of important events concerned with human rights and the Helsinki process have taken place since the 1983 Madrid meeting reported on in this volume, in particular, the two meetings in Ottawa and Bern and the successfully concluded Stockholm Conference on Security in Europe. Nevertheless, the essays in this volume are not dated, since they concern ongoing problems that will continue to arise in the Helsinki process. The student of that process will be pleased to find a volume that reports on the results of the second review meeting and includes valuable case studies. The New York-based Helsinki Watch Committee, the U.S. State Department and the U.S. Commission on Security and Cooperation in Europe provide valuable occasional information for persons interested in the Helsinki Accords, but the bringing together of information in this single volume is an important and welcome addition to the literature on the Helsinki process and human rights. It is to be hoped that the Dutch group of human rights lawyers will provide us with a future volume on events subsequent to the Madrid meeting from the Western European perspective.

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Israel Yearbook on Human Rights. Volume 15, 1985. Edited by Yoram Dinstein.

Published under the auspices of the Faculty of Law, Tel Aviv University.

Pp. 311.

Volume 15 is unique in the series because the major portion of its text is devoted to reproducing the papers presented at the Conference on "Affirmative Action" (Equality, Discrimination and Preferential Treatment) held at Tel Aviv University in December of 1984 (pp. 9-112). A distinguished group of scholars from the United States, England, Australia and Israel deal with some of the controversial aspects of affirmative action, as this legal and social concept is implemented and enforced within the legal systems of these states, which in turn has universal ramifications. In numerous instances there is a direct application to international human rights protection. Thus, Professor Yoram Dinstein begins the symposium by advancing the position that the prohibition against discrimination in the exercise of human rights is an

integral part of customary international law (p. 9). Moreover, the UN Charter, in Articles 1(3), 13(1), 55(c) and 76(c), provides that human rights and fundamental freedoms must be respected without distinction as to race, sex, language or religion. Several of the contributors review the series of UN conventions, particularly the Covenant on Civil and Political Rights, that prohibit discrimination and thereby serve as the foundation for the subsequent application of affirmative action. Special attention is directed to the International Convention on the Elimination of All Forms of Racial Discrimination. The total effect of the series of regional and international human rights conventions is that the prohibition against discrimination emerges as a general, procedural principle that cuts across all substantive human rights and is currently accepted as positive law.

This norm of nondiscrimination is carried forward by Professor Miriam Benson in her analysis of *Equal Pay for Work of Equal Value* (pp. 66–87), with reliance on the binding force of international treaties. Thus, a review of the applicable instruments, with particular emphasis on International Labour Organisation (ILO) Conventions, reveals the universal application of the norm, especially by the Court of Justice of the European Communities. In the process of enunciating the Community law of nondiscrimination, recourse has been made by the Court to applicable ILO Conventions and also to the European Social Charter, as can be seen from its expanding corpus of case law. Accordingly, Community law has become a significant source of remedies that have been invoked by individual complainants.

The objectivity of the volume is assured by Professor Farrokh Jhabvala, who presents an in-depth analysis of *The International Covenant on Civil and Political Rights as a Vehicle for the Global Promotion and Protection of Human Rights* (pp. 184–203). Despite his “affirmative-sounding” title, negative conclusions are advanced. He contends that substantive human rights codified in the series of conventions have yet to be implemented by states parties. Rather, assertions of state sovereignty have prevented the establishment of universal human rights norms. In fact, the original intentions of the treaty drafters, i.e., to establish a uniform floor of international human rights standards, have not been realized by the efforts of the United Nations. So extreme is this variation in the degree of respect shown toward human rights norms by UN members—and so ineffective have those human rights codified in the Civil and Political Covenant proved to be when invoked by individuals—that Jhabvala adopts an even more extreme position when he concludes that these human rights treaties “not being truly universal or binding . . . achieve this [goal of standard setting] no differently from declarations of the UN General Assembly” (p. 201). Indeed, he maintains they exert no greater impact than declarations of the UN General Assembly—a position not shared by this reviewer. Because of the socioeconomic contexts of the states parties in which human rights must function, the majority of UN members are unable to implement these Western-oriented guarantees.

The remedy, therefore, is to place greater emphasis on increasing the effectiveness of the Human Rights Committee and, simultaneously, to improve the monitoring system, pursuant to the Covenant on Economic, Social

and Cultural Rights. Within this context, the original distinctions between civil and political rights on the one hand, and economic guarantees on the other, must be minimized and a uniform system of implementation perfected by the Human Rights Committee, accompanied by an expanded role of assistance from UN organs. Hence, Jhabvala believes that resources must be directed toward a more rigorous enforcement of existing conventions rather than drafting additional, specialized instruments.

The articles section of the *Yearbook* concludes from a different perspective, since Professor Leo Gross presents *Some Observations on the United Nations Draft Code of Offences Against the Peace and Security of Mankind* (pp. 224-73), an area in need of additional codification. The application of international criminal liability against individuals, and eventually against governments, continues to grow in importance. Beyond question, there is a need to define and codify those offenses (e.g., apartheid, colonialism, damage to the human environment and international terrorism, including violence against diplomatic agents) that constitute a continuing threat to the peace and security of mankind.

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The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights. By Paul Sieghart. Oxford and New York: Oxford University Press, 1985. Pp. xviii, 252. Indexes. \$15.95.

This volume forms part of the "OPUS" series from Oxford University Press, whose purpose is to "provide concise, original, and authoritative introductions to a wide range of subjects in the humanities and sciences. [Books in the series] are written by experts for the general reader as well as for students." Those who seek an erudite, technical treatise will be disappointed by *Lawful Rights*, but it does succeed well in its less profound goal of offering a general introduction to human rights law to the nonspecialist.

The book begins with a simple allegory of a mythical primitive society and examines how such a society gradually develops a system of government and rights as it gains in social complexity. Part I of the book, "What Lies Behind the Code," follows this development through contemporary notions of sovereignty and public international law. Part II, "How the Code was Made, and How It Works," describes the development of international human rights law, including the establishment of principles such as the norm of nondiscrimination and the possibility of derogating from rights in states of emergency; it concludes with a brief survey of national and international procedures to enforce human rights norms. Part III, "What the Code Says," summarizes the substantive rights protected under the major international human rights texts, while a useful appendix contains excerpts from nine global or regional human rights instruments.

Sieghart emphasizes that *Lawful Rights* is about what he terms the "code" of international human rights law rather than about the philosophy of human

rights per se (e.g., p. x), but he also strives to place the substance of that law in the everyday language of political science and morality.

[The international code of human rights has a clear bias] in favour of the kind of society that displays a specific coherent set of civilized values: tolerance of diversity; plurality of belief, ideas, and culture; reasonableness and rationality; the peaceable resolution of conflicts under the rule of law; and, above all, respect for the dignity, autonomy, and integrity of every single one of its individual members [p. 42].

The prose is informal and generally effective in conveying to the reader the broad outlines of what international human rights law contains and how it should work. There is, for example, a good rebuttal of the common theoretical argument that torture may be justified in order to prevent the explosion of a terrorist bomb (pp. 112-14)—although Sieghart neglects to note another telling point, i.e., that not a single specific example of such a “justification” for torture has ever been put forward by any government.

While it is inappropriate to subject an introductory work such as this to an overly detailed or academic critique, a few observations are nevertheless in order. The book does adopt a particularly Western, if not to say English, perspective throughout, as in its description of the requirements of the “rule of law” (pp. 88-89); its distinct preference for “human” rights over “peoples’” rights (pp. 161-66); and its almost condescending description of the “special soil” and “well-established roots” necessary for democracy (p. 155). There is some confusion in equating the effectiveness of international remedies to protect human rights with the issuance of legal or legalistic opinions by an international body, which results in a rather unfair summary dismissal of the work of the UN Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities (see generally pp. 95-104). The definition of the “code” itself excludes such basic texts as the Conventions against racial discrimination and discrimination against women, although inclusion of the European Social Charter is welcome.

In general, however, the book’s analysis is sound and most of its opinions well taken, for example, in its emphasis on the objective nature of any inquiry into whether or not a human rights standard has been met (pp. 73-75); the need to interpret narrowly a government’s discretion to restrict certain rights;¹ and the necessity of actually *reading* the legal texts that set forth those standards (p. 107)—this last requirement is a task dispensed with by too many lawyers and politicians.

Sieghart’s earlier book on *The International Law of Human Rights*² remains an important tool for the international legal scholar and human rights practitioner; *Lawful Rights* is a valuable addition to the literature aimed at the more general or less interested reader. In a time when majority rule seems to lead as often to repression of dissenters as it does to a more generous

¹ See, e.g., pp. 114-15 (freedom of movement) and pp. 140-43 (free exchange of information and ideas).

² Reviewed at 78 AJIL 534 (1984).

expression of the will of the people, one might be satisfied if the only message remembered from *Lawful Rights* is that of its closing paragraphs:

In the last analysis, all human rights exist for the benefit of individuals who are weak, and who need protection from oppression, persecution, exploitation, and deprivation by those who are strong. If their weakness derives (as it usually does) from some difference which distinguishes them from the dominant group they will see themselves, and be seen by their oppressors, as a minority, regardless of how many of them there are.

In that sense, therefore, all human rights exist for the protection of minorities. And that thought may provide a fitting conclusion to this book [p. 168].

And to this review.

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Procedural Aspects of International Law Institute

Indian Rights—Human Rights: Handbook for Indians on International Human Rights Complaint Procedures. Washington: Indian Law Resource Center, 1984. Pp. 129. \$4.

With the emergence of the United Nations as a world forum for debating differing conceptions of fundamental values, the concept of human rights has come to eclipse the prior normative paradigms of Western legal and political discourse.¹ From one perspective, Western efforts to focus the attention of international legal and political forums on human rights can be viewed as a highly leveraged investment strategy.² Exposing the human rights violations of a caricatured Eastern expansionist menace represents a relatively cost-free rhetorical investment in the West's own security. At the same time, since governmental suppression of dissent is viewed as ultimately threatening the stability of the West's Third World client states, policing the human rights abuses of those states helps secure a more stable environment for Western investments. There is a litmus test for the proposition that the West's focus on human rights in the expansionist East and the as yet unannexed Third World has as much to do with interest as with values. The proof is the West's continued exclusion of the Fourth World, the indigenous tribal peoples of the Americas, Australia and New Zealand, from full participation in the evolving discourse of international human rights law. The

¹ The literature on natural rights and natural law and its history in Western European thought is extensive. *The Political Theory of Possessive Individualism* (1962), by C. B. Macpherson, remains one of the finest monographs on the legacy left by Hobbes and Locke to modern political thought. *American Interpretations of Natural Law* (1931), by B. Wright, and two essays by Habermas, *The Classical Doctrine of Politics in Relation to Social Philosophy and Natural Law and Revolution*, in J. Habermas, *Theory and Practice* (1973), also provide interesting, if somewhat divergent, treatments of the same topic.

² See generally the varied set of readings contained in *SOCIAL CHANGE: THE COLONIAL SITUATION* (I. Wallerstein ed. 1966) on the impact of Western colonization on Third World nations.

fundamental values articulated in the new emphasis on human rights have so far not been permitted to challenge the order of interests maintained by the imperialist Western powers in the homelands of those peoples that the West has not yet decolonized.³

Despite the efforts of Western governments to contain application of this new discourse of human rights to the East and decolonized Third World, Western tribal nations have increasingly demanded access to international forums to expose and protest the abuses of their colonial masters. Not only do such activities speak to contemporary Western tribalism's renaissance and resilience, they also directly challenge long-held European-derived legal conceptions on tribal status and rights that have dominated international theory and practice for half a millennium.

These European conceptions of Indian status and rights derive from the Doctrine of Discovery. That doctrine, best articulated by Chief Justice Marshall in 1823, was used to draw two inferences. First, the discovering European nation possessed "the sole right of acquiring the soil from the natives . . . a right with which no Europeans could interfere." Second, "[t]hose relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them."⁴

Those inferences have been tenaciously defended by the West to this date. Thus, Canada has asserted that "[i]nternational, American and Canadian law do not recognize treaties with North American Native People as international documents confirming the existence of these tribal societies as independent and sovereign States."⁵ The controversy over that position has made itself felt in the United Nations. Chapter XI of the UN Charter, "Declaration Regarding Non-Self-Governing Territories," provides that member states that have assumed responsibility for administering territories whose peoples have not yet attained a full measure of self-government must ensure just treatment of dependent peoples. Annual reporting to the United Nations of conditions in such territories is required. Belgium took the lead in arguing that chapter XI should be applied not only to overseas colonies or protectorates, but also to indigenous peoples within the boundaries of the member states themselves. Its position was opposed by Latin American and other states and essentially rejected by General Assembly Resolution 1541 in 1960.⁶

³ See generally Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73 (1983).

⁴ *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573-74 (1823). On the doctrine and its influence in European legal theory and discourse respecting indigenous peoples and their rights, see generally Henderson, *Unravelling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 75, 87-105 (1977). See also R. BARSH & J. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 49 (1980).

⁵ Barsh, *supra* note 3, at 97.

⁶ See GA Res. 1541, 15 UN GAOR Supp. (No. 16) at 29, UN Doc. A/4684 (1960). See generally Barsh, *supra* note 3, at 84-87; G. BENNETT, *ABORIGINAL RIGHTS IN INTERNATIONAL LAW* 12-13 (1978); and Andress & Falkowski, *Self-Determination: Indians and the United Nations—The Anomalous Status of America's Domestic Dependent Nations*, 8 AM. INDIAN L. REV. 97, 109-14 (1980).

Indigenous peoples have begun to challenge these Eurocentric conceptions of their international status. Within the United Nations itself, perhaps the most significant event in the movement was the conference sponsored by the UN Non-Governmental Organizations and held at Geneva in 1977 on Discrimination against Indigenous Peoples of the Americas. It adopted a Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere (reprinted in the appendix, p. 121). It called for the recognition of indigenous nations meeting the requirements of nationhood as nations and subjects of international law. It also called for a more qualified recognition of other indigenous groups. Another conference in 1981 on Indigenous Peoples and the Land was attended by indigenous representatives from five continents. Since that time a working group has met annually, its activities being directed towards issues of self-determination, land and other rights defined in UN declarations and covenants.

Indian Rights—Human Rights: Handbook for Indians on International Human Rights Complaint Procedures, published by the Indian Law Resource Center in Washington, D.C., represents an important milestone in this struggle of Western indigenous peoples to express their vision of the fundamental values to be incorporated into international legal discourse. Designed as a step-by-step manual on international procedures for protecting human rights, it seeks to provide Indian people with the grammar and syntax of international human rights law.

The *Handbook* is a significant contribution to the broad international law reform movement of indigenous peoples. It represents an effort to encourage Indians to test the applicable extent of international human rights law in protecting their rights as tribal peoples. Designed to "help Indians make informed decisions about human rights procedures" (p. vi) in terms that nonlawyers can understand, *Indian Rights—Human Rights* carefully explains the basic facts about contemporary international human rights law, the most important human rights complaint procedures and how indigenous peoples might go about utilizing this material in order "to begin serious human rights work at the international level" (p. vii). Along with step-by-step instructions for preparing a formal complaint, the book's appendix reprints the major human rights documents of international law, including the UN Charter articles on human rights, the international Human Rights Covenants and the human rights instruments adopted by international bodies such as the Organization of American States (OAS). In further fulfillment of their prefatory promise that for "most Indian victims of human rights violations, this handbook will be all that is needed" (*id.*), the editors at the Indian Law Resource Center have also provided an address list of the major international human rights organizations.

Because the *Handbook* is written as a self-described manual for Indian leaders and individuals, the discussion on human rights law is short on jurisprudence and analysis, and long on explication and application. There are brief remarks on the "meaning" of human rights, short legal histories on the adoption of the important international human rights instruments and lightning-quick asides on the Realpolitik dimensions of human rights

law. For instance, in their introductory remarks on the limited protections offered by human rights procedures, the editors state that "those who successfully use the international human rights laws and procedures will not win court orders and international police action against an abusive government. Rather, the most that can usually be expected is public attention and political pressure against the government" (p. 5). While noting that publicity and pressure "ha[ve] often helped stop human rights violations" in the past, the editors warn that there is no "guarantee that human rights laws and procedures will resolve any particular human rights problem" (*id.*).

While the book pays careful attention to explaining the practical procedures for drafting a complaint that meets the formal requirements for communications to bodies such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) or the OAS Inter-American Commission on Human Rights, the Navajo grandfather who sits down with *Indian Rights—Human Rights* (or his Guatemalan brother who uses the Spanish version of the *Handbook*, *Derechos Indios—Derechos Humanos*) might be better served by a bit more information about those instances where human rights law, combined with publicity and pressure, helped stop human rights violations. While *Indian Rights—Human Rights* is careful to point out which countries are bound by which human rights instruments, and which complaint procedures might prove most useful as vehicles for Indian human rights concerns, very little is offered in the way of precedents and examples that inform the reader of past instances where human rights law has proven effective or ineffective in preventing or stopping abuses. If the life of the law is experience, then *Indian Rights—Human Rights* could have provided its users with a bit more life. We are told, for instance, that in a case involving the human rights of Indians in Canada, the UN Human Rights Committee issued a decision based upon a complaint filed under the Optional Protocol to the International Covenant on Civil and Political Rights (p. 38). The decision in the case helped persuade the Canadian Government to reform those laws that discriminated against Indian women (*id.*). That is all we are told, although it certainly would have provided the reader with a better context for understanding the import of this 1981 case, *Lovelace v. Canada*,⁷ had it been made clear that Canada was advised by the Committee that it had violated the Human Rights Covenants with respect to its treatment of Sandra Lovelace, an Indian woman who protested a provision of Canada's Indian Act that denied Indian status and resultant benefits to an Indian woman who married a non-Indian. Indian men who married non-Indians were not similarly treated. Other instances where indigenous peoples have used or are currently using international human rights procedures to publicize their complaints and pressure their colonial governments would have added immeasurably to the utility of the *Handbook*.

But this is only a small fault in a purposefully small but important book. *Indian Rights—Human Rights* achieves what it sets out to do: inform Indian

⁷ *Lovelace v. Canada*, Communication No. R.6/24 (announced July 30, 1981). See 36 UN GAOR Supp. (No. 40), Ann. XVIII, UN Doc. A/36/40 (1981).

people of an important body of developing law that may be of use in securing their own goals (even their own survival) as a people. Just as important, the book serves as a useful primer on how Indians can go about contributing to that development process. It is a contribution that the West has sought to block now for half a millennium, but one that must be rapidly incorporated into human rights discourse if the West's indigenous nations are to survive into the next millennium.

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The Refugee in International Law. By Guy S. Goodwin-Gill. New York: Clarendon Press; Oxford University Press, 1984. Pp. xxvi, 318. Index. \$47.50, cloth; \$14.95, paper.

If the 100 years that started in 1900 are the century of the common man, as they have been described, they are also tragically, as Heinrich Böll has observed, the century of the refugee. Although refugees have been known throughout history, the wars, revolutions, repression and unmitigated disasters since the beginning of this century have driven more than 100 million people from their homes and countries in every continent. Their plight has become a daily newspaper story. "[W]hen large numbers of refugees cross a border," a commentator has observed, "the international limelight too often fastens on the receiving countries; their actions are subjected to minutely critical scrutiny, while the sending countries, the real sources of the problem, remain happily in the shadows."¹

While the UN human rights agencies have been striving to achieve and to implement normative law to "prevent and eliminate conditions which precipitate the massive exodus which results . . . from human rights abuses," a body of international and municipal law has emerged over the past 60 years designed to establish and protect the rights of refugees in the receiving countries. It is this body of law dealing with the rights of refugees that Goodwin-Gill, Legal Advisor in the Office of the UN Commission for Refugees, has surveyed with "critical scrutiny," following in the wake of earlier works such as *The International Protection of Refugees*² by Weis, *The Status of Refugees in International Law* (2 vols. 1966, 1972) by Grahl-Madsen and his own previous study, *International Law and the Movement of Persons Between States* (1978).

His stated purpose is "to show that refugees are a class known to and defined by general international law . . . that states are bound not to return refugees to territories where they may be persecuted . . . and that the international community . . . has the . . . legal standing to protect refugees." The international law that Goodwin-Gill has described is far more complex and much less universal than the principle asserted by Grotius that

¹ Martin, *Large-Scale Migrations of Asylum Seekers*, 76 AJIL 598, 599 (1982).

² 48 AJIL 193 (1954).

"those exiled or banished from their own country [have] the right of dwelling in a foreign country,"³ and than Vattel's commentary that

the earth was designed to feed its inhabitants; and he who is in want of everything is not obliged to starve, because all property is vested in others. . . . Extreme necessity revives the primitive communion, the abolition of which ought to deprive no person of the necessities of life. . . . The same right belongs to individuals when a foreign nation refuses them a just assistance.⁴

In a sense, the vast movement of millions of people between countries speaks to the demographic force of the Grotian-Vattelien concept. Thus, one sees in the last century the 1.2 million Greeks who were expelled from Turkey; the 1.5 million White Russians who fled the Soviet Union; the interchange of 14 million Hindus and Sikhs with 6 million Moslems between Pakistan and India; the flight of 650,000 Palestinian refugees from Israel; the pouring into the United States of 800,000 Cubans; the movement into Somalia and the Sudan of 1.2 million Ethiopians and into Pakistan and Iran of nearly 4.5 million Afghans; the approximately 1 million Vietnamese resettled in the United States, China, France and other countries; the estimated half million Salvadorans who have seeped into the United States through Mexico; and the hundreds of thousands of Banyarwanda Tutsis and Hutus in Uganda, Burundi and Rwanda who have fled into neighboring countries in Africa.

In this context, Goodwin-Gill has succinctly traced the international instruments that have provided the legal basis for defining the rights of refugees and that culminated in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol. He also reviews the application of these instruments by the UN Commissioner for Refugees and the nations that have acceded to the Convention and Protocol. As Goodwin-Gill has detailed, the international legal framework for refugees has necessarily been built upon the foundations of national sovereignty and territorial supremacy and, as others have noted (Keely, *Refugee Policy* (1981)), in a European context following the First and Second World Wars.

Goodwin-Gill reviews the insistence by the states participating in the process upon "fairly restrictive criteria for identifying those who are to benefit from refugee status." What has emerged, interstitially and incrementally, has been both a broadened definition of refugees protected by international agreements and a more inclusive application of the agreement to those who are not strictly regarded as "statutory refugees." He notes that the statutory definition that a refugee is a person outside of the country of origin who is unable or unwilling to return there owing to a well-founded fear of being persecuted upon the ground of race, religion, nationality, social group or political opinion is "essentially individualistic." The determination of who is a refugee contemplates a "case by case examination of the subjective and objective elements." The work also includes a useful thumbnail summary

³ H. GROTIUS, *DE JURE BELLI AC PACIS*, bk. II, §125, at 180 (Carnegie Endowment trans. 1925).

⁴ E. DE VATTEL, *THE LAW OF NATIONS* §120, at 178 (J. Chitty ed. 1839).

of the procedures available under municipal law in the major receiving countries, including the United States.

Withal the protection afforded to refugees, Goodwin-Gill concludes that "[r]ecent experience has . . . emphasized the inadequacy of the existing legal framework to cope satisfactorily with refugee crises, particularly where large numbers are involved." He points to the need, expressed in the proposal by the special rapporteur of the UN Commission on Human Rights for a "New International Humanitarian Order,"⁵ for an examination of the relationship between human rights and mass exoduses, and he favors the proposals of the Federal Republic of Germany for the adoption of guidelines to prevent "new flows."

Quoting Sadruddin Aga Khan, Goodwin-Gill observes that while making a major contribution to an understanding of existing refugee law, "concentration on these issues . . . may detract from that other and higher objective which is the recognition for everyone of 'the right to belong—or alternatively to move in an orderly fashion to seek work, decent living conditions and freedom from strife'."⁶

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International Law and the Superpowers: Normative Order in a Divided World. By Isaak I. Dore. New Brunswick: Rutgers University Press, 1984. Pp. xiv, 202. Index. \$30.

The fundamental thesis of this book is that there are, as the title indicates, normative—if largely implicit—rules governing the interaction of the United States and the Soviet Union that can be inferred from a careful analysis of the behavior of the two superpowers in a variety of "crisis situations." The cases chosen by the author to test this methodology involve the concept of aggression as it relates to forcible extraterritorial interventions by the superpowers.

Professor Dore's analysis suffers from a basic failure to distinguish between the descriptive and the normative. In his words, "the major problem is the extent to which it is possible to abstract rules from observing and analyzing superpower conduct in trouble situations and crisis management" (p. 28). The answer is that it is, of course, possible to abstract rules of the sort: "when superpower A does X under Q circumstances, superpower B can be expected to do Y." Such a rule is, however, purely descriptive. It reveals nothing about what either superpower, or anyone else, believes is right, or ought to be done or not done, in any given situation.

The author, however, fails to consider this distinction, and thus finds himself in a conceptual blind alley of his own making. Having properly discarded "case law" as a source for the content of the normative "rules" he wishes to find, he is left with a "behaviorist" approach that is reduced, by

⁵ GA Res. 36/136, 36 UN GAOR Supp. (No. 51) at 185, UN Doc. A/36/51 (1981-82).

⁶ Study on Human Rights and Massive Exoduses, UN Doc. E/CN.4/1503 (1981).

his own admission, to extracting these rules purely by analyzing the superpowers' past behavior (pp. 25-29). But the only way such an analysis could be made to yield anything of normative significance would be forcibly to insert an "ought" in the final product, which would produce the empty conclusion that the superpowers ought to resolve "trouble situations" the way they always have in the past. In avoiding the trap of positing this conclusion as a normative rule of superpower behavior, Dore finds himself reduced to the descriptive observation—itsself of questionable value—that "only such action will be taken by either power in a crisis situation as will be tolerated by the other power" (p. 37).¹ How is this different from saying "either power will do anything it can get away with"? And once we say that, what happens to the search for a system of "normative" rules?²

In this light, it is clear that the "norm of mutual noninterference in bloc affairs," which the book posits as the "fundamental principle of superpower coexistence" (p. 129), is not a "norm" at all in any meaningful legal sense, but simply describes a reality of power relations between the superpowers. Neither the United States nor the Soviet Union acknowledges, implicitly or explicitly, any particular normative obligation not to interfere in the other's "bloc"³ (a term with which Dore never quite comes to grips, a notable omission considering its importance to his argument⁴); it is merely that each superpower recognizes that the risks of interfering, in most cases, outweigh the potential benefits. Where that risk-benefit calculation changes, as it did, for example, for NATO member Portugal in 1974 when Soviet-backed forces attempted to seize power and very nearly succeeded, this "fundamental principle" may be "violated" at will. President Ford, in a statement that Dore quotes, but whose profound implications for his own argument he ignores, said it best when asked about U.S. assistance to anti-Allende forces in Chile: "I am not going to pass judgment on whether it is permitted or authorized under international law. It is a recognized fact that, historically as well as presently, such actions are taken in the best interests of the countries involved" (pp. 73-74).

Superpower policymakers do not need to be told that threatening the other superpower's vital interests is dangerous; they need to know what the other superpower perceives its vital interests to be, what actions on their part will be seen as threats to those interests and what responses can be

¹ As a statement of history, this proposition is self-evident, as the superpowers have not gone to war; as a prediction, it is equivalent to saying that there will never be a war between the superpowers, obviously an overbroad and unsupportable assertion.

² For an excellent explanation of the distinction between normative and descriptive "rules" in a legal context, see H. L. A. HART, *THE CONCEPT OF LAW* 82-83 (1961).

³ The Conference on Security and Co-operation in Europe: Final Act, 73 DEP'T ST. BULL. 323 (1975), 14 ILM 1292 (1975), which is sometimes cited as codifying such a rule, is considerably more limited in scope than Dore's posited norm and is, in any event, by its own terms not legally binding.

⁴ How, for instance, would Dore's "bloc" approach apply to the current situation in Nicaragua? Is that country a wayward member of the U.S. "bloc" in which the Soviets have improperly interfered, thus giving the United States the "right" to take countermeasures? Or is it now a new member of the Soviet "bloc" in which any U.S. interference will be viewed as improper?

expected if such actions are taken. To begin to formulate meaningful answers to those questions requires a far more sophisticated analysis than Dore has provided here, taking into account a host of factors he neglects such as domestic political determinants; the balance of military power at the strategic, regional and local levels, and shifts in those balances over time; intra-alliance politics; ideological and cultural biases; and many others—including an analysis of those normative rules that really do influence superpower behavior, i.e., *internal* ones deriving from the basic imperatives of preserving and expanding power and influence on the world scene without undue risk of war.⁵

The author's misplaced effort to force his essentially descriptive analysis into a normative framework, which requires him to generate "rules" that are formally reciprocal and neutral, produces some very distorted substantive propositions. For instance, while he presents a competent exegesis of the Soviet theory of peaceful coexistence, he fails to draw the conclusion his own description compels: that since "peaceful coexistence," in Soviet terms, means nothing more or less than the eventual destruction of the capitalist order without (unnecessary) resort to violence, a "modus vivendi" between the socialist and capitalist systems is *ex hypothesi* impossible. According to the very Soviet theorist upon whom Dore most heavily relies, Grigorii Ivanovich Tunkin, at the root of relations between capitalist and socialist states lies the class struggle between the bourgeoisie, the dominant class in capitalism, and the proletariat, the dominant class in socialism. This struggle is irreconcilable and must end with the extinction of one of the two social orders—namely, capitalism—and its replacement by the other system—namely, socialism.⁶ To speak of a "modus vivendi" emerging from this struggle is a fundamental contradiction in terms and a distortion of Soviet legal and political thought.

Even more troublesome is the manner in which the author continually equates U.S. and Soviet international political practice. Although he acknowledges once or twice (e.g., p. 75, with respect to the "Johnson Doctrine" and the "Brezhnev Doctrine") the greater intolerance and repressiveness of Soviet behavior, he is constantly forced by the exigencies of his own theoretical framework to draw strained parallels between the actions of the two superpowers in "crisis situations." There is something seriously wrong with an analytical approach that blandly lumps together the Soviet invasions of Hungary in 1956 and Czechoslovakia in 1968, on the one hand, with U.S. actions in the Korean War and the Cuban missile crisis on the other, as examples of "the emerging law of interbloc reciprocity." When Dore concludes on the basis of this type of analysis that "[i]ndividual member states of the existing blocs cannot voluntarily withdraw their membership or escape bloc jurisdiction over internal or external policies of theirs that are deemed to affect bloc solidarity" (p. 76), he has taken his morally neutral, scrupulously evenhanded approach far past the point of usefulness into the

⁵ An excellent description of such internal norms in the Soviet case is found in H. ADOMEIT, *SOVIET RISK-TAKING AND CRISIS BEHAVIOR* 317-25 (1982).

⁶ See G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 35-48 (W. Butler trans. 1974).

realm of unreality. No matter what formal similarities may exist, the basic reality of the Warsaw Pact is completely different from that of the Organization of American States, not to mention NATO. To conclude otherwise would be to believe that the OAS invariably follows U.S. dictates, or that the peoples and Governments of the German Democratic Republic, Czechoslovakia and Poland had a real say in the decision to deploy Soviet nuclear weapons on their territories.

Perhaps the most striking example of the distorted results that this book's analytical framework can yield is its discussion of the Cuban missile crisis. In Dore's view, the outcome of the crisis, *inter alia*, "implies that the power to decide on the use of nuclear weapons is to be restricted to the ultimate policymakers in each bloc," and that what was unacceptable to the United States was that "[t]he missiles in Cuba created the possibility of Cuban participation in any such future decision-making" (p. 130). Thus, the "norm" inferred from the examination of this "crisis situation" is formally neutral and reciprocal, as required by the book's methodology. Unfortunately, it happens to be wrong. It was not the possibility of Cuban participation in nuclear decision making that disturbed the U.S. Government, but the fact that the deployment of Soviet missiles in Cuba represented a sudden and significant enhancement of hostile nuclear striking power, radically increasing the direct physical threat to the security of the United States.⁷ U.S. policymakers had in fact no reason to think that the Soviets would allow Castro any participation in their nuclear decision making, whether or not Soviet missiles were on Cuban territory.⁸ The posited rule also stands up rather poorly against NATO's dual-key system for nuclear decision making.

The author attempts to buttress the normative significance of his study of "crisis situations" by examining certain pieces of international "legislation" such as "the 1963 Test Ban Treaty, the 1967 Space Treaty, the 1971 Seabed Treaty, the 1974 [UN General Assembly] definition of aggression, and the Helsinki Final Act of 1975." Unfortunately, however—and inexcusably for a study whose stated aim is to elucidate the development of normative rules in the U.S.-Soviet relationship—he neglects the most important joint efforts of the superpowers themselves to place their relationship on an explicitly rule-governed footing, failing to discuss the Basic Principles of Relations Between the United States of America and the Union of Soviet Socialist Republics⁹ or the Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Nuclear War.¹⁰

Stylistically, this 135-page book is mercilessly padded, with frequent announcements of what points are about to be made and unnecessary summaries of the points that have just been made. Thirty-two pages of the 135 consist of an adaptation of the author's previously published law review

⁷ See R. KENNEDY, THIRTEEN DAYS 35-36 (1969).

⁸ Indeed, U.S. intelligence reports at the time indicated that the Soviets were not even permitting any Cubans to enter the missile bases. *Id.* at 58.

⁹ 66 DEP'T ST. BULL. 898 (1972).

¹⁰ June 22, 1973, 24 UST 1478, TIAS No. 7654.

article on arms control in the oceans and outer space, the relevance of which to the book as a whole is inadequately explained.

Notwithstanding the book's shortcomings, the author's goal—to bring some legal sense to the perilous relations between the nuclear superpowers—is a noble and worthwhile one. With additional research (in particular, greater consideration of the relevant contributions of the political study of international relations), further reflection on fundamental concepts such as the distinction between descriptive and normative rules, and tighter editing, this study could form the nucleus of a significant contribution to the literature.

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World Polity. Conflict and War: History, Causes, Consequences, Cures. By James P. Speer. Fort Bragg, Cal.: Q.E.D. Press, 1986. Pp. 323. Index. \$16.95.

The author tells us that he has been a public servant, a university professor, a political aspirant, a stock broker and a concessions negotiator for an oil company. Perhaps he could have written a fascinating book about his career. Instead, Speer chose to write what he calls "the most thorough statement of the causes of international conflict yet published" (p. 2). This he brackets with a highly compressed and inevitably idiosyncratic "Summary of International History," and a plea for a world federal government. None of these is satisfactory in its own right. Put together, they tend to work at cross-purposes.

The Summary of International History covers several civilizations, and thus several millennia, in fewer than 50 pages. Space is wasted on peculiar judgments: "The political thought of Plato and Aristotle was . . . never able to rise above the level of the city-state" and "Mercantilism foreshadowed state socialism" (pp. 9, 13). One page goes to Cromwellian England and capitalism's remarkable career over several centuries gets no more than a page in all. Speer's history is political and intellectual, while social and economic history is treated as background, or not at all. Speer reveals the point of the exercise only at its conclusion. It permits him to make an argument—he calls it a descriptive generalization—about international history, namely, that violence, conquest and integration characterize all international systems, with the result that each such system becomes a unified entity in yet another, larger system. As Speer sees it, this process has brought us now to the possibility of global war and global government.

The long second part on the causes of conflict is organized along the lines of Kenneth N. Waltz's famous *Man, the State and War* (1959). It is not "the most thorough" study of this subject available. R. J. Rummel's five-volume *Understanding Conflict and War* (1975–1981) comes to mind as a candidate for this distinction. It may be the most eclectic. It is certainly one of the most superficial, consisting mostly of quotations from and references to sundry authorities. Again, the point of the exercise turns out not to be what Speer claims. In the guise of a survey, he gives us an argument.

Speer holds that anarchy is the basic cause of war and that it gives play to other causes. Although he defines anarchy as a condition of no rule (p. 113), he treats it as a condition of war. This makes anarchy a shorthand description, rather than a general explanation, of the way things are. He also calls anarchy an ailment, the prescription for which is federal government. Logically, the conditions of rule and peace would go together in Speer's system of paired alternatives, but he recognizes that rule per se neither insures peace nor protects other, pluralist values. Hence, much of part III is devoted to the virtues of federal government as the only acceptable form of rule on a global scale.

Part III also makes the case that the global situation is rapidly deteriorating. The worse things are, the more obvious it is that something must be done. Yet the worse things are, the harder it is to do anything on the scale required. Speer finesses this dilemma by citing opinion—opinion polls and select elite opinion—to the effect that a world federal state is desirable. He provides few clues, however, on how opinion would be converted into action. He does venture to say that “probably a terrible crisis will be necessary” (p. 310). Yet, in the end, he betrays an optimism so characteristic of this genre of writing and so much at odds with his assessment of the current situation. “And, really now, which is more incredible—a governed world or a gone one?” Or is it more incredible that these are the only alternatives?

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A Common Sense Guide to World Peace. By Benjamin B. Ferencz. London, Rome, New York: Oceana Publications, Inc., 1985. Pp. xvi, 112. Index. \$15.

At a time when symptoms of major global malfunction intrude hourly and when respect for the international law of peace seems everywhere on the decline (not least in Washington), it is remarkable to hear a voice that is “cautiously optimistic” (p. xi) about the evolution of a peaceful world order under law. Yet such is the soothing essence of this small but spirited volume. Urging us to comprehend “that humankind is experiencing an erratic and turbulent evolutionary movement toward a more rational world order” and “to view the historical glass as half-full rather than half-empty” (p. xi), former Nuremberg prosecutor Benjamin Ferencz, no Pollyanna, encourages us to believe that there is “no cause for despair” (p. 95), “no reason to lose heart” (p. 97). To the contrary, he writes, “[a]lthough the lights of progress flicker and grow dim from time to time, the trend toward an integrated, coordinated and more humane world is clearly discernable [*sic*] to the penetrating eye” (p. 95). We should take hope, he argues, and find inspiration in the “total picture” of the past four thousand years of human accomplishment (p. 91)—in the “significant progress” of the past four decades especially (p. 95)—and from this affirmative stance try to understand

and act upon the "common sense" requirements of "a more enlightened international order [that] will be able to enrich all of humankind" (p. 97).

The "common sense" requirements Dr. Ferencz proposes are of two kinds. The first, "What *Should* Be Done" (pp. 43-70), includes the following:

(1) "Improve International Law"—by making international legal norms at once more rigorous and more responsive to the common inclusive interest;

(2) "Increase the Judicial Role"—and other modalities for the peaceful, third-party settlement of international disputes (including creation of an international criminal court); and

(3) "Enforce International Law"—via UN reform, control of national arms, effectively coordinated economic and military sanctions (including a properly empowered UN peace force), and expanded "caring and sharing" relative to the world's natural and human resources.

The second, "What *Can* Be Done" (pp. 71-98), also divides three ways:

(1) "Settle by Compromise" the major tensions of contemporary international affairs—the nuclear arms race and existing rancorous conflicts in the Middle East, Iran-Iraq, South Africa, Namibia, Central America, Afghanistan, Kampuchea, Korea and Berlin;

(2) "Educate and Organize for Peace"—by mobilizing world opinion (through formal and informal communication networks as well as through classrooms) and by creating an independent, nongovernmental "Permanent Council for Peace" composed of "dedicated, knowledgeable and distinguished world citizens" who would propose solutions to the world's most vexing problems and who "could go over the heads of governments to reach the eyes, ears, hearts and minds of people everywhere"; and

(3) "See the Total Picture"—by understanding the essential interconnectedness of all of global life and the progressive as well as retrogressive dimensions of global history.

Ferencz's enthusiasm for these prescriptions is infectious. It is hard to imagine how anyone could dissent from them.

Of course, one can respond skeptically, even cynically, to everything Ferencz is about, pointing up the frailties of the international system and the formidable behavioral and structural obstacles that otherwise impede civilizational progress. The author's "common sense" assessments of "What *Should* Be Done," embodying a kind of wishful thinking or sense of geopolitics that—typical of international lawyers—tends to exaggerate the role of law and adjudication in the modern world, themselves invite no small questions about feasibility and probability even while inviting praise. Indeed, even his assessments of "What *Can* Be Done" do not escape major doubts of this kind. It is already bad enough that the two superpowers seem incapable of freeing the world's peoples from nuclear terror, but when a country such as the United States, with its long tradition of respect for the rule of law (at least domestically), not only turns its back on, but ridicules, the World Court,

as lately it has done to the dismay of many, even reviewers as sympathetic as this one find ample room for despair.

Yet it is precisely this kind of demoralization against which Ferencz aims his principal fire. And his essential point—the power of positive historical thinking—is well taken. “To focus . . . on the shortcomings of nations without [acknowledging] those areas of social interaction where significant progress has been made,” he asserts, “is to paint a bleak and distorted picture [that] erodes the public confidence needed to stimulate the improvements that are required . . . to make the international system more effective” (p. 95). Agreed. Unless or until this historical-reformist viewpoint is taken seriously to heart, opening the way for an aroused citizenry to secure the political credibility it needs to pursue a “common sense” world order agenda of the sort Ferencz prescribes, that agenda never will be realized—or at least not fast enough to avert the ultimate catastrophe nobody wants.

All this said, however, one is left still to ask whether the world's leaders will take this viewpoint seriously to heart. And this question, in turn, raises two friendly criticisms—one stylistic, the other substantive—that suggest hurdles far larger than Ferencz appears willing to acknowledge.

First, by too frequent lapses into “man-made” language (e.g., “man” and “mankind” in lieu of, say, “humanity” or “humankind”), Ferencz inadvertently reveals not only how difficult the struggle really is, but how exclusionary even the message can be. And for a message that needs all the converts it can get, not least to resist the condescending criticism with which self-styled “realists” doubtless will greet Ferencz's idealism, surely this sort of impropriety ought to be avoided. It tends to alienate and annoy, not to persuade (as does also, it must be added, the too frequent misspellings and punctuation errors of the publisher).

Second, Ferencz's monograph, a guide in the sense of a set of laudable goals that serve to direct our thinking, but no guide in the sense of a map of how to get us from the crisis-ridden “here” to the common-sense “there,” would have proved far more convincing had at least some small attention been given to the transition steps needed to make Ferencz's prescriptions reality. As those directly and indirectly associated with the erstwhile World Order Models Project have made abundantly clear, it is not enough simply to observe, however accurately, that what mainly is needed is political motivation and will. The compromises and retreats, the long and hard gives-and-takes required—these in particular must be addressed, conscientiously and repeatedly, if a peaceful and just world order is ever to be realized.

One hopes that Ferencz will correct these deficiencies and give us the further benefit of his intrepid thinking in a “Common Sense Guide to World Peace—Part II.” In the meanwhile, for the present volume, we owe him a vote of thanks for making the dream of “world peace through world law” more credible.

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Verification and Arms Control. Edited by William C. Potter. Published under the auspices of the Center for International and Strategic Affairs, University of California, Los Angeles. Lexington and Toronto: D. C. Heath and Company, 1985. Pp. xiii, 266. Index. \$29.

This book is based on papers presented by a number of distinguished political scientists, physicists and defense experts at a conference convened by the UCLA Center for International and Strategic Affairs in Los Angeles in 1984. It shows that, skillfully edited, proceedings of conferences on timely topics can result in interesting and informative books. Verification is critically important to the success of arms control, and many studies have been written on this topic. A distinguishing characteristic of this book is its focus on the political context of verification in the United States, and its useful explanation of the Soviet perspective.

The leadoff chapter, by James Schear of the Harvard Center for Science and International Affairs, is a complex assessment of the strengths and limitations of cooperative measures for verification between the superpowers. He suggests as simplistic the traditional view that the Soviets resist effective verification because of their obsessive secrecy, while the United States emphasizes it because of its more open society. The Soviets are not as obstinate, or the United States as open, as they are often portrayed. Schear also observes that unrestricted on-site inspection is not the panacea, as is so often argued in this country, but should be kept in perspective as part of a balanced series of tools, including national technical means of verification.

The book's most interesting chapter, by Allan Krass of Hampshire College, concentrates on the Soviet perspective on verification. He points out that, in negotiations, the Soviets have stressed reaching agreements in principle before developing verification provisions. The United States, on the other hand, has emphasized verification as a starting point and seeks to push the Soviets as far as possible on this point. Krass details the evolution of the Soviet posture regarding on-site inspection as evidenced in discussions on a comprehensive test ban and the Peaceful Nuclear Explosions Treaty (negotiated by the United States in 1976 but not ratified), and in more recent Soviet proposals on chemical weapons control. He concludes with the pointed comment that

verification has often served as a surrogate issue that is somehow easier to argue about than the more fundamental conflicts over military-strategic doctrine that are the real sources of disagreement. As a result, verification has been asked to bear too great a burden, and in the inevitable distortions of political debate, the Soviet perspective on verification has not been given an honest and objective hearing in the U.S.

Warren Heckrotte, a physicist at Lawrence Livermore National Laboratory who served as a member of the U.S. negotiating team, provides an excellent historical analysis of U.S.-Soviet negotiations to stop underground nuclear testing. He suggests that a considerable evolution of the Soviet position on verification has occurred, and that an agreement to prohibit testing

is within reach if the United States wants it. The correctness of the author's view has been clearly evidenced by the 1986 Soviet moratorium on underground testing and subsequent Soviet proposals for on-site inspections.

William Durch's paper on verification of antisatellite weapons limitation suggests that U.S.-Soviet agreement in this area would yield obvious mutual benefits, but that there is little reason for optimism about any such agreement beyond the often discussed "rules of the road" legitimizing certain types of activities in space.

Dean Wilkening's chapter on "air breathing" weapons strikes a similarly pessimistic note regarding the difficulty of monitoring deployment of cruise missiles, but correctly notes that their long flight times (unless deployed close to borders) do not make them a destabilizing first-strike weapon.

The book's only paper by a non-U.S. citizen is written by a Canadian government official, F. R. Cleminson, and concentrates on verification problems relating to chemical and biological weapons. Biological weapons are given an unfortunately short treatment, but Cleminson does suggest a two-phase treaty for chemical weapons, concentrating respectively on reduction and destruction of existing stocks, and on nonproliferation.

Michael Krepon, of the Carnegie Endowment, provides a penetrating look at the political environment shaping the verification and compliance issue in the United States. He anticipates the apparent successful effort of the Reagan administration to use this issue to scuttle the unratified SALT II restraints. The following chapter, by Mark Lowenthal and Joel Whit, also discusses the political context and calls for the depoliticization of verification and its return to a proper perspective as a component of arms control.

The final two chapters include a lengthy description from public sources of the complex array of national technical means available to the United States to monitor Soviet adherence to arms control agreements (by Jeffrey Richelson of American University), and a careful look at the Standing Consultative Commission (SCC) (by Dan Caldwell of Pepperdine University). Caldwell argues cogently that the SCC operated "quietly and effectively" during the Nixon, Ford and Carter administrations as a problem-solving body. He observes that, in the current hostile climate, the SCC is more useful than ever; it has set a pattern that could be emulated in other agreements (such as on biological weapons), and it could have a role in crisis prevention and management.

Verification is currently being used as a weapon by those in this country who have a visceral dislike for the Soviet Union and a deep distrust of arms control as a major component of our national security. The result has been much confusion in the public and an often incoherent U.S. negotiating posture. Perhaps it is time for a broad national debate on verification, on both its limitations and its realistic contributions to arms control agreements with the Soviet Union. This book is an excellent source of information and ideas, and can contribute to this process.

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Der Einsatz von Nuklearwaffen nach Art. 51 des I. Zusatzprotokolls zu den Genfer Konventionen von 1949. By Horst Fischer. Berlin: Duncker & Humblot, 1985. Pp. 267. DM 98.

Article 51 enunciates the rules for protection of the civilian population in time of war. The issue Dr. Fischer addresses in his book is whether or not this article applies to the use of nuclear weapons. This question arises because Article 51 does not specifically identify nuclear weapons as subject to the prohibitory restrictions it imposes on military operations.

The international law problems connected with the use of nuclear weapons have been discussed for some time, notably in the context of the ruling by Judge Toshima Kozeki of Tokyo District Court.¹ Examining this case, Richard A. Falk pointed out that the answer to the question of legality (or illegality) of the use of nuclear weapons depends on one's "mode of thinking."² One approach relies on "the intrinsic legal character of the weapon, either outlawing or permitting it." The other, "the contextual mode of analysis," views the outlawing or admissibility of the weapon in question in the context of its use.

It is the contextual mode of thinking that underlies Fischer's analysis. Accepted as a dissertation by the Law Faculty of Ruhr-Bochum University, Fischer's work earned him the highest academic accolade and the university prize for excellence.

The book consists of three parts. It opens with a detailed examination of technical aspects of nuclear weapons and their effects when used. Showing great familiarity with these questions, Fischer emphasizes the inescapably indiscriminate nature of nuclear warfare. Moreover, because the scope of its effects cannot be precisely determined or restricted, danger to the civilian population is inherent in the use of nuclear weapons.

This finding is a steppingstone to the next phase of analysis where he evaluates the implications of two intertwined factors in the use of nuclear weapons. First, he examines how the policies of nuclear weapons states affect the probability of their recourse to nuclear weapons. Then he considers the potential impact of nuclear military strategies on the degree of danger to the civilian population. Within this framework, he suggests that a mutual nuclear deterrence policy, based on the principle of equality, SALT I and SALT II, is the essential condition for world stability and the maintenance of peace. Whichever policy or strategy endangers this stability *eo ipso* increases the danger of nuclear warfare. Accordingly, Fischer includes among such destabilizing elements not only the policy aimed at nuclear superiority, but also any other intended to make the nuclear deterrent of the adversary

¹ Judge Kozeki ruled on Dec. 7, 1963, in the *Shimoda* case that the bombing of Nagasaki and Hiroshima was in violation of international law because both cities were undefended and indiscriminate attacks by atomic bombs caused more inhumane suffering than poison gas. In support of his ruling, he referred to the St. Petersburg Declaration, the Hague Agreement and international customary law.

² See *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki*, in *INTERNATIONAL LAW IN THE TWENTIETH CENTURY* 733, 761 (L. Gross ed. 1969).

ineffective. This clearly encompasses, although the author does not say it explicitly, the Strategic Defense Initiative of the United States.³ Among military factors, those improving the precision of nuclear weapons, as well as strategies assuming victory in nuclear warfare, aggravate the danger of recourse to nuclear weapons. Applying these criteria to the United States and the USSR, Fischer finds their nuclear policies and strategies converging, as both seek a military decision before a political settlement. Under these circumstances, the question whether Article 51 applies to nuclear warfare becomes of paramount importance in international law.

It is in part II of the book where Article 51 and especially its sections 4 and 5, defining and prohibiting the types of indiscriminate attacks against civilians, are analyzed in detail. It is from the context of these two sections and their relation to the effects of nuclear warfare that Fischer derives the prohibition of the use of nuclear weapons. But, as he points out, the illegality of nuclear warfare can also be derived from other international treaties, e.g., the St. Petersburg Declaration, the Hague Agreement of 1907 and the Geneva Convention on Poison Gas. Moreover, international customary law has banned indiscriminate operations against noncombatants and civilians since the 19th century. Yet, as Fischer sees it, it is important that the efforts under international humanitarian law to protect civilians have now been accepted by the community of nations and codified in Protocol I, signed in December 1977.

However, the United States explicitly declared that its signature was subject to the understanding that Protocol I does not apply to the use of nuclear weapons. To defeat this notion (and also a like objection of the United Kingdom), Fischer reviews the historical process leading to Protocol I, to show that from the beginning the purpose of the conferences was to formulate international rules that would regulate nuclear warfare as well as conventional warfare. To further support his position that Protocol I is part of international law, he engages in an extensive literal and conceptual interpretation of the U.S. (and UK) declarations. In the end, Fischer concludes that the U.S. reservation (and also that of the United Kingdom) is without substance and could not change anything regarding the international validity of Protocol I, and the prohibition of the use of nuclear weapons. The Protocol entered into force on December 7, 1978.⁴

Yet Fischer recognizes that the effective application of Protocol I ultimately depends on the policies and conduct of the nuclear weapons states. Therefore, as he mulls over this question, he admits that the effectiveness of the prohibition will depend on the scope and nature of any reservations

³ For a contrary view, see Weinberger, *U.S. Defense Strategy*, 64 FOREIGN AFF. 675 (1986). The Secretary maintains that, inter alia, competitive strategies and further research on projects including the Strategic Defense Initiative are necessary to make the U.S. nuclear deterrent more credible and secure vis-à-vis the USSR.

⁴ The industrialized countries that had ratified Protocol I by the end of 1985 are Austria (1982), Denmark (1982), Finland (1980), Norway (1981), Sweden (1979) and Switzerland (1982). Yugoslavia ratified Protocol I in 1979, the Holy See in 1985. The only nuclear weapons state to ratify this Protocol, though with reservations, was the People's Republic of China, in 1983.

that the United States might deposit upon the ratification of Protocol I.⁵ Still, Fischer contends that even if, as a result of any U.S. reservations, some sections of Article 51 cease to be valid as international treaty law, the prohibition of indiscriminate attacks by nuclear weapons would remain legally binding in accordance with the international customary law of war.

In part III, Fischer summarizes the implications of Article 51, assuming its unrestricted validity, as follows: (1) the use of nuclear weapons as an instrument of war is "out" ("*ausgeschlossen*"); (2) their indiscriminate deployment against civilians is inadmissible; and (3) "first strike" nuclear strategy is prohibited. (Why the author suddenly deviates from terminology used earlier when he referred to the effects of Article 51 is nowhere explained.)

But Fischer is clearly pessimistic about the prospects that the nuclear weapons superpowers would give up or even agree to the restricted use of nuclear weapons in armed conflicts. And he reminds the reader that if these countries continue to insist on technologically oriented strategies and ideologically fixed policies of national security, it will certainly signal that they do not care either about the population of their adversary or about their own, or ultimately about the survival of mankind.⁶

Whether one accepts Dr. Fischer's conclusions obviously depends on one's "mode of thinking." Nevertheless, it must be recognized that his thorough, well-balanced analysis of essential aspects of nuclear warfare is an important contribution to international law studies in this field. His documentation of both sides of the issues is excellent. But the lack of an index is definitely annoying, particularly in view of the literally hundreds of concepts, opinions and sources to which Fischer refers throughout his book.

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Use of Force Under International Law. By J. N. Singh. New Delhi: Harnam Publications, 1984. Pp. xiv, 273. Rs. 120.

The purpose of this relatively short book by Professor Singh of the University of Delhi was apparently to provide an analysis of legal issues concerning various uses of force by nation-states in self-defense or while pursuing other individual and/or collective objectives. The book is divided into the following topics: self-defense, collective security, achievement of individual objectives (including attention to self-help), achievement of collective objectives (including attention to the use of force in response to human rights

⁵ This may be a moot issue as far as the United States is concerned. According to this writer's information, the administration does not intend to present Protocol I for ratification, not even if all the other parties to Protocol I acquiesce in the U.S. reservation that the Protocol does not apply to nuclear weapons.

⁶ *But cf.* Weinberger, *supra* note 3, at 681: "We do not, in fact, plan our retaliatory options to maximize Soviet casualties or to attack deliberately the Soviet population. Indeed, we believe such a doctrine would be neither moral nor prudent."

deprivations and to promote self-determination), illegal force "ab initio" and force recognizably illegal "at a subsequent stage." Although several notable contexts are addressed, including the Israeli evacuation mission at Entebbe, the Israeli destruction of an Iraqi nuclear installation, the Soviet downing of the KAL airliner, the Soviet intervention in Afghanistan, the Iran-Iraq war, the Falklands/Malvinas fray, the Grenada action and the emergence of the new state of Bangladesh, it is admittedly Bangladesh that forms the primary focus for contextual analysis. As Singh notes, the book is based largely on his Ph.D. thesis, which addresses the same general topic.

Despite a too frequently halting and disjointed style and a flawed use of the English language, the book is worth reading for its treatment of the issues concerning India's use of force in the pre-Bangladesh context. It provides a sufficient counterargument to the critics of India's use of force, while addressing claims to use force in self-defense and to promote human rights and self-determination. The author rightly adds, with respect to Pakistani acts of genocide, politicide, crimes against self-determination and violations of other human rights, and more generally, that governmental elites that use force even against their own people in violation of human rights law and/or the precept of self-determination commit a violation of Article 2(4) of the UN Charter. Such a violation, the author aptly recognizes, can justify responsive uses of force, where reasonably necessary and proportionate, to serve community expectations or objectives and overall purposes of the international "system" documented in the Charter.

The work is also useful in providing the conclusions of an Indian writer concerning several other notable examples of the use of armed force. These are interspersed among various chapters and, as there is no index, they often have to be gathered by a thorough reader undaunted by an occasionally clumsy use of logic and repetition. Such a reader will discover citable statements about various incidents and the general propriety of the use of armed coercion and countercoercion. Singh, for instance, is among the writers who recognize the legality of the Entebbe evacuation mission and other efforts at self-help; the propriety in certain circumstances of humanitarian intervention, self-determination assistance and, more controversially, "preemptive" self-defense; the permissibility of state-sponsored force against the illegal Government of South Africa; and the illegality of the U.S. use of force in Grenada in 1983.

Curiously, he condemns outright the U.S. claims concerning politicide, human rights and self-determination in the Grenada context, but he is unable to overcome a stated caution concerning the facts needed in order to condemn the Soviet interventions in Czechoslovakia and Afghanistan and what most recognize as an illegal use of force by the Soviet Union when it downed a KAL airliner attempting (most importantly) to leave Soviet airspace. Such caution seems all the more inappropriate when it is realized that the author makes several conclusory points throughout the work about general normative issues and other specific contexts, often without supporting footnotes. Indeed, Singh offers a seemingly inconsistent approach to issues of self-determination and human rights in Czechoslovakia (1968) and South Africa

or Bangladesh (1971). His analysis of Afghanistan is closer to his recognitions concerning illegality in South Africa and Bangladesh, but one wonders whether he is needlessly inhibited by older positivist notions of authority and "the state" (there are quite a few references to Kelsen), as opposed to expectations about the authority of governments documented in Article 21 of the Universal Declaration of Human Rights and so many post-1970 developments. In any event, most of the legal works cited are from the 1950s and 1960s; hardly a newer work cited is dated beyond the early 1970s and citations to relevant journal or law review articles are scarce.

Again, the work is primarily useful for its treatment of the pre-Bangladesh uses of force and for the series of conclusions by an Indian writer with respect to other relatively recent uses of force, conclusions that are too often unavailable in American libraries.

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International Criminal Law. Volume I: Crimes. Edited by M. Cherif Bassiouni. Dobbs Ferry: Transnational Publishers, Inc., 1986. Pp. xix, 581. Indexes. \$60.

This is the first volume of a projected three-volume treatise on substantive and procedural aspects of international criminal law. It naturally invites comparison with an earlier work¹ on the same subjects, also edited by Professor Bassiouni. While this work takes full account of the many developments in international criminal law since the earlier treatise was published in 1973, it is far more than a revised edition of that work.

The earlier volumes suffered from uneven quality, since each chapter had been prepared by a different author, and were generally disjointed and unintegrated. These defects are almost completely absent from the present work, though it, too, is the product of a collaborative effort among several authors. Indeed, the degree of cohesion and integration that the editor has succeeded in creating from such diverse materials is itself a considerable achievement; Bassiouni might appropriately be listed as a coauthor of the whole work rather than merely its editor.

As the title implies, this volume is concerned with the substance of international criminal law. Taking the structure of a continental penal code as a model, the editor has organized it into a "General Part" and a "Special Part," the first covering the theory of international criminal law, the status and prospects of codification efforts, and the problem of state criminal responsibility; and the second covering individual crimes.

The "General Part" is by far the stronger of the two. While Bassiouni's theories naturally predominate and serve to tie these chapters together, the views of the other authors admirably round out his discussion of international criminal law theory. In particular, Daniel Derby's "realist" approach provides a useful counterpoint to some of the more optimistic essays.

The "Special Part" includes chapters on crimes against peace, war crimes,

¹ A TREATISE ON INTERNATIONAL CRIMINAL LAW (M. Bassiouni & V. Nanda eds. 1973).

genocide, apartheid, slavery, torture, human experimentation, piracy, air hijacking, hostage taking, narcotics control and crimes against cultural property and the environment. The content of these chapters is generally of high quality, as would be expected in light of the qualifications of the authors. The beginning student should use this part of the work with care, however, since some of the chapters present individual, and even idiosyncratic, opinions rather than a comprehensive treatment.

For example, in one of the chapters on war crimes, Yves Sandoz makes the startling assertion that Article 85 of Additional Protocol I² to the Geneva Conventions, on "grave breaches," effectively prohibits destruction of merchant ships, fishing boats and passenger vessels, even though part IV, section I of the Protocol (which Article 85 is intended to implement) expressly excludes naval warfare from its scope of application. The suggestions of Sandoz and his colleague at the International Committee of the Red Cross, Michel Veuthey, on the possible impact of the Additional Protocol on nuclear and chemical weapons also seem contrary to the basis on which it was negotiated, at least in the view of eminent authorities.³ Even where controversial, however, the "Special Part" of this volume is always stimulating and provocative, and hence valuable.

The work's value as a reference is enhanced by the frequent inclusion of treaty texts, UN reports and other primary sources as appendixes to individual chapters. This value would be even greater if the work had included a table of cases and treaties cited, an omission that could be remedied in later volumes. One also hopes that later volumes will show more careful proofreading. Typographical errors are a major irritant in some chapters where they are so numerous that they discourage direct quotation of important passages in the text.

In general, however, this volume offers both the consistency, organization and cohesion typical of a single-author treatise, and the diversity of views of a collaborative work. If volumes II and III maintain the high standard of volume I, no library dealing with international criminal law will be adequate without this work.

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A Guide to United Nations Criminal Policy. By Manuel López-Rey. Brookfield, Vt.: Gower Publishing Company, 1985. Pp. xi, 142. Index. \$36.95.

This book deals with some of the UN criminal justice programs and activities from 1946 to 1985. It is the first to describe cohesively and systematically the wide-ranging and disparate involvement of the United Nations in this broad field over such a long period of time. Because of its breadth, it is more than "a guide" but less than a comprehensive review of all the

² UN Doc. A/32/144, Anns. I and II (1977), reprinted in 16 ILM 1391 (1977), 72 AJIL 457 (1978).

³ See M. BOTHE, K. PARTSCH & W. SOLF, NEW RULES FOR THE VICTIMS OF ARMED CONFLICTS 188-91 (1982); Aldrich, *New Life for the Laws of War*, 75 AJIL 764, 781 (1981).

UN activities and programs in the field. Nevertheless, the author, in relatively few pages, has provided an incisive overview of some of the most substantial aspects of criminal justice policy activities and programs in the last four decades.

The author is a distinguished Spanish jurist who served as a judge and then as a professor of criminal law at the University of Salamanca. His association with UN programs spans almost four decades. His work as chief of the Section of Research and International Treaties in the Division of Narcotic Drugs was followed by his directorship of the Section of Social Defence, which later became the Crime Prevention and Criminal Justice Branch. Since 1979, he has served as a member of the Committee on Crime Prevention and Control, and in 1984 was elected chairman.¹ He is therefore uniquely qualified to write this book.

The book is divided into three main chapters: chapter 1, "Overview," chapter 2, "Machinery" and chapter 3, "Main Subjects of United Nations Criminal Policy." Each chapter is divided into headings, describing in summary a selected variety of aspects dealing with the subject matter of the chapter. It is to that extent an excellent starting point for the researcher in this field.

Chapter 1 describes in a few pages the overall program of the United Nations in criminal justice with emphasis on policymaking. It does not sufficiently underscore that the United Nations does not have a comprehensive program in criminal justice, and that whatever has taken place in this area lacks overall vision. This is evident in the lack of coordination among the various UN structures (p. 41).² In the human rights area a number of bodies consistently deal with criminal justice questions, but their activities are not coordinated with other bodies working in the same or related fields. The Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, and what is now the Centre for Human Rights have dealt over the last 40 years with such questions as genocide, apartheid, torture, cruel, inhuman or degrading treatment or punishment, the death penalty, extrajudicial executions, incommunicado detention, arbitrary arrest and detention, and a variety of other human rights issues that relate to the administration of criminal justice and to its abuses of human rights.³ These important activities carried out at the Geneva UN headquarters are seldom coordinated with the activities of the Crime Prevention and Criminal Justice Branch, which until 1980 was in New York, and is now in Vienna. Similarly, there is no coordination between the Geneva-based structures and the Vienna-based structures concerned with narcotics, namely, the Commission on Narcotic Drugs, the International Narcotics Control Board and the Division of Narcotic Drugs, which had earlier been

¹ See David, *Introduction*, in *CRIME AND CRIMINAL POLICY: PAPERS IN HONOR OF MANUEL LÓPEZ-REY Y ARROJO* (P. David ed. 1985).

² See also Bassiouni, *The United Nations and Other International Organizations Active in the Field of Criminal Justice*, 6 *NOUVELLES ETUDES PÉNALES* 92 (1985).

³ See, e.g., *UNITED NATIONS ACTIVITY IN THE FIELD OF HUMAN RIGHTS*, UN Doc. ST/HR/2/Rev.2 (1983).

based in Geneva. More incongruous is that the Division of Narcotic Drugs is in the same Vienna buildings as the Crime Prevention Branch, but there is seldom any meaningful cooperation between these two organs of the Secretariat. Formally, this cooperation and coordination is supposed to exist, but in reality it does not. The author is well aware of that and has frequently voiced his concerns about this problem. In addition, there are a number of activities and programs conducted by the International Labour Organisation in Geneva regarding slavery and slave-related matters. They, too, are carried out with little or no cooperation from the Crime Prevention Branch. Finally, there is practically no cooperation between the human rights, ILO and narcotics structures and the Committee on Crime Prevention and Control. The geographic separation of these operating units, and their distance from New York headquarters, is one of the main impediments to effective cooperation, particularly in light of budgetary constraints that prevent closer contacts between their administrators and staff.

Among these structures, programs and activities, the author deals primarily with the Crime Prevention Branch and the Committee on Crime Prevention, and only secondarily with the Division of Narcotic Drugs and the ILO, with respect to some of the slavery matters, but not with the human rights structures, programs and activities. Furthermore, he avoids criticism of the painfully obvious lack of coordination.

The problems of crime and the concerns about crime prevention and the improvement of criminal justice systems' capabilities to respond to these problems are evident in almost every part of the world.⁴ But for some UN member states, this is an "internal" matter in which the United Nations should not be involved (see p. 1 n.1); for others, it is one of the most important issues of our time. Indeed, crime and its economic, social and political costs affect almost every country and cut across so many issues, whether they be human rights, women's status, juvenile issues, economic development, population, transnational trade or many other areas covered by UN programs and activities. Unfortunately, only very few of these programs include a crime prevention and criminal justice component, even though it may be highly relevant. The absence of an overall UN vision in this respect has precluded the development of an overall UN program, but the author diplomatically skirts this subject.

Of late, the United Nations has come to recognize that international and transnational crime affects the quality of life throughout most of the world. This has been particularly evident in the recent UN concerns about combating illicit traffic in drugs and related offenses such as money laundering and, in particular, international terrorism.⁵ But international crime also affects other basic international concerns, some of which have a bearing on

⁴ But see F. ADLER, *NATIONS NOT OBSESSED WITH CRIME* (1984).

⁵ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Aug. 26–Sept. 6, 1985, UN Doc. A/CONF.121/22/Rev.1; Report on the Ninth Session, Committee on Crime Prevention and Control, Vienna, Mar. 5–14, 1986, UN Doc. E/AC.57/1986/9; and also UN Doc. E/1986/INF/4 (1986); UN Doc. A/40/751 (1985).

international peace such as aggression, genocide, crimes against humanity and apartheid.⁶ The book does not, however, deal with these issues, even though they are concerns of the United Nations. This may be due to the fact that international criminal law issues are still dealt with in part by penalists and in part by publicists who do not always seem to come together.⁷ The author's orientation is that of a penalist with a strong penchant toward criminology, and that explains why a major segment of international criminal questions and human rights, which are treated by the United Nations, are left out of this book.

The author's description in chapter 2 of the UN machinery omits discussing, as stated above, various UN structures, programs and activities. However, his descriptions of the Committee on Crime Prevention and Control, and of the Crime Prevention and Criminal Justice Branch, are adequate and laced with specific examples of programs and activities. However, they are free of serious critical assessment even where it is warranted, as regards coordination and cooperation in programs and activities, limited resources and lack of adequate and sufficient scientific, technical and support staff. This is probably due to the author's desire to support these structures, particularly at a time when the lack of an overall UN program in this field and the current budget-cutting mood may result in curtailing even further the already limited programs, activities, staff and resources of the Crime Prevention Branch. That would, indeed, be a tragic outcome and, in some respects, its prospects make the book more important, since it highlights the many accomplishments of this organ, which has always had so little to work with. The author has, to this reviewer's personal knowledge, been a longtime constructive critic of all the shortcomings mentioned above.

In chapter 3 the author deals with "Main Subjects of United Nations Criminal Policy." He lists various subjects in which the United Nations has been involved, including a number of human rights and international criminal justice aspects. However, in the subsequent substantive description, he focuses only on a few of them, omitting most significantly the international criminal justice and human rights programs and activities (see pp. 47-130). This chapter contains the author's perceptions of the history and development of criminal justice policy as reflected by the activities related to the Committee on Crime Prevention and Control, the Crime Prevention and Criminal Justice Branch and the United Nations Congresses on Crime Prevention and the Treatment of Offenders (see, e.g., p. 107). However, as with all historical perceptions, they are always subject to the writer's selection of those facts that he may view as more important than others. Thus, the role of nongovernmental organizations (NGOs), though mentioned at different times throughout the book, is still treated as if it were secondary to the three main bodies on which the author focuses (see, e.g., pp. 6, 9, 56,

⁶ See, e.g., M. C. BASSIOUNI, *INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985* (2 vols. 1985).

⁷ See Bassiouni, *Characteristics of International Criminal Law Conventions*, in 1 *INTERNATIONAL CRIMINAL LAW* 5 (M. C. Bassiouni ed. 1986).

68, 76).⁸ Perhaps it is because he wishes to give these UN bodies the lion's share of credit for the accomplishments he describes. But it is noteworthy that the NGOs in the field of criminal justice have, since the 1950s, provided the most significant scientific contributions to the work of the seven UN Congresses on Crime Prevention and the Treatment of Offenders, which are held at 5-year intervals, as well as to the work of the Committee on Crime Prevention and Control and the Crime Prevention and Criminal Justice Branch.⁹ In fact, these organizations and their individual members, who have served as consultants to these bodies, have probably produced the bulk of the scientific reports that have been the basis of the work product of these three structures.¹⁰ Presumably for political reasons known only to the United Nations, these facts are neither emphasized nor publicized.

The author's selectivity can also be seen in the rather scant treatment he gives to the UN congresses, which have provided so far the most significant body of reports, studies and resolutions in the field he covers (see pp. 20–27). These have been the basis of almost all the resolutions and action programs adopted by ECOSOC and the General Assembly in this field. In the few pages he dedicates to the congresses, the author emphasizes more the particulars of where a congress took place and how many participants attended and what their qualifications were, than the wide variety of subjects discussed (usually five main agenda items per congress), and he fails to give adequate recognition to the numerous Secretariat reports, governmental reports and NGO contributions (see p. 10). This is not to say that he does not mention some of the most visible results of some congresses such as the Resolution on Torture adopted by the fifth congress in 1975,¹¹ and the

⁸ See also Bassiouni, *Report on the Scientific Activities of the International Association of Penal Law (AIDP) and its International Institute of Higher Studies in Criminal Sciences (ISISC) with the United Nations and Council of Europe*, 6 NOUVELLES ETUDES PÉNALES 101 (1985).

⁹ The International Penal and Penitentiary Commission entered into an agreement with the United Nations to cede its functions, and that is how the United Nations became involved in the field of criminal justice; see GA Res. 415, 5 UN GAOR Supp. (No. 20) at 37, UN Doc. A/1775 (1950). The Commission then became the International Penal and Penitentiary Foundation. See López-Rey at 6–9.

¹⁰ See Bassiouni, *supra* note 8. The four major associations in the field of criminal justice have contributed to every congress a number of reports dealing with at least one, if not more, of the five agenda items of the congresses and organized a joint preparatory colloquium on one of the main congress topics for every congress since 1955. These organizations are the International Association of Penal Law, the International Society for Criminology, the International Society of Social Defence and the International Penal and Penitentiary Foundation. The work of other NGOs such as Amnesty International and the International Commission of Jurists, and of members of the Alliance of NGOs on Crime Prevention and Criminal Justice in New York and Vienna, is hardly mentioned by López-Rey except for a reference to the Alliance (p. 63) and the International Institute of Higher Studies in Criminal Sciences (Siracusa) (p. 94). The Institute also contributed significantly to the work of the Crime Prevention Branch and to the sixth and seventh congresses.

¹¹ The resolution was adopted by ECOSOC and then by the General Assembly as the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in 1984 the General Assembly adopted a resolution incorporating the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46. The original text of the Con-

work of the earlier congresses of the 1950s concerning the Standard Minimum Rules for the Treatment of Offenders.¹² However, that does not cover the bulk of important resolutions adopted by these congresses. Also worthy of mention is the fact that the UN Congresses on Crime Prevention and the Treatment of Offenders, unlike other UN congresses, have not been marred by political considerations and ideological conflicts between states. Until recently, in fact, most of the participants in these congresses have been experts either in their individual capacities, or as members of their governmental delegations, or as members of intergovernmental and nongovernmental delegations. This may well be the reason why these UN congresses have been much more fruitful than others.

The author describes some bodies and activities with a certain amount of license. For example, his description of the UN-affiliated institutes is, to say the least, overly generous (see pp. 28-31). One of those institutes, UNAFEI, has conducted an intensive training program and conducted some valuable research in the Asian region, and HEUNI has been very active in Europe; however, ILANUD, in Costa Rica, has yet to make a measurable contribution to Latin America and UNSDRI, the Interregional Research Institute, which has existed for quite some time in Rome, has yet to reach its fullest potential. All of these institutes are promising, but they, too, need to be integrated into an overall program, and their efforts to be coordinated.

Probably because of the author's personal involvement in many of the issues, he also has a tendency to mix his own views and personal assessments and preferences about certain policies and measures with other, more objectively descriptive material (compare p. 31). Surely, that insight is valuable and helpful, but it manifests itself more frequently where it appears that the author has a personal interest. While he mentions his work as one of the chiefs of the Crime Prevention and Criminal Justice Branch, and that of the last chief, Minoru Shikita, with whom he worked closely in the last few years, it would have been appropriate for him also to have mentioned the other

vention was prepared by a Committee of Experts under the chairmanship of this writer and Niall MacDermot, Secretary-General of the International Commission of Jurists, which convened at the Siracusa Institute. The text was then submitted by the International Association of Penal Law to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/NGO/213 (1978). See also 48 REVUE INTERNATIONALE DE DROIT PÉNAL, Nos. 3-4 (1977).

¹² Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolutions 663 C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, reprinted in HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, UN Doc. ST/HR/1/Rev.2 (1983). The sixth UN congress recommended measures for the implementation of the United Nations Standard Minimum Rules for the Treatment of Prisoners, UN Doc. A/CONF.87/11 (1980), which were prepared by this writer as a consultant to the Secretariat. ECOSOC adopted these measures in May 1984, on the recommendation of the Committee on Crime Prevention and Control at its 8th session, UN ESCOR Supp. (No. 6) at 50, UN Doc. E/1984/16. See also Bassiouni, *The U.N. Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners*, in Festschrift für Dietrich Oehler 525 (R. D. Herzberg ed. 1985).

directors who have contributed significantly, in particular the late William Clifford and Gerhard O. W. Mueller.

Since the book is the first of its kind, it is a tribute to the author that he could say so much in 142 pages. Its uniqueness makes it a landmark contribution in an area largely ignored by the scholarly literature. One hopes, however, that the reader will not look at it as the definitive book on UN work in this field, which was not the author's intention, though at times one has the impression that he would have liked to embark on such a broad endeavor. Nevertheless, as the author states in the introduction, there are approximately four thousand documents on matters concerning criminal policy, and it would indeed be an enormous undertaking to synthesize this vast material, let alone to derive from it a UN "policy."

The greatest merit of this book may ultimately lie in the fact that, in this cost-cutting era of the United Nations, and particularly because criminal justice has never been high on the agenda of those deciding on the priorities of UN work, it may lead a number of influential persons to rethink the need for the United Nations to have a comprehensive criminal justice program. Such a program should not be limited to maintaining a Committee on Crime Prevention and Control (which meets only for 10 days in the 2 years following the 5-year UN congress cycle), a Crime Prevention and Criminal Branch with only a handful of staff, and the periodic Congresses on Crime Prevention and the Treatment of Offenders, which regrettably resolved that they may be held less often in the future.¹³

A true UN vision of what an overall criminal justice program should be would include the various issues of crime, crime prevention and control, criminal justice policy planning and implementation, and the administration of criminal justice as these relate to the many UN programs and activities in the various areas that affect or are affected by these issues. But, alas, this is not yet the case.

This lengthy review reflects the need to make more information available to the general public and to improve UN structures, programs and activities in the field of criminal justice.

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International Criminal Responsibility of States. By Farhad Malekian. Stockholm, 1985. Pp. xviii, 234. Index.

The international law of state responsibility has been debated extensively since the turn of the century,¹ and the International Law Commission (ILC)

¹³ See ECOSOC's first regular session of 1986, May-June 1986, UN Doc. E/1986/92.

¹ E. DE VATTTEL, *LE DROIT DES GENS* (1887); D. ANZILOTTI, *TEORIA GENERALE DELLA RESPONSABILITÀ DELLO STATO NEL DIRITTO INTERNAZIONALE* (1902), reprinted in D. ANZILOTTI, *CORSO DI DIRITTO INTERNAZIONALE* (1928); 3 K. STRUPP, *HANDBUCH DES VÖLKERRECHTS*—

has been concerned with it since 1946. Collective responsibility, however, has existed in one form or another throughout history. Tribes, villages, city-states and other forms of collectivities have long known and practiced some type of collective responsibility (pp. 33-45). However, the practices of such collectivities throughout history do not fit into the more contemporary categories of the law of international responsibility, in particular the distinction between civil and criminal responsibility, theories of fault and risk, and national and international acts that give rise to responsibility.² Even sophisticated early legal systems, such as the Greek, Roman and Islamic ones, are not helpful with respect to these contemporary legal distinctions. These and other practices, however, form a historical basis for what is intended to be a rational doctrine of state responsibility that would be both an effective deterrent to wrongful conduct and an adequate basis for compensation for its harmful results.

The author appropriately begins, in chapter I, with a brief introduction on the development of the various concepts of international state responsibility. Though limited in its coverage (13 pages), it sets the basis for the ensuing development of the author's thesis. However, rather than moving from that premise to historical precedents, the author, in chapter II, briefly discusses the evolution of the concept of international state responsibility through the work of regional and international organizations. In this chapter, he deals with the efforts of the League of Nations and the United Nations, and the work of the ILC from 1956 to 1981, but does not go into detail (pp. 18-32).

Chapter III retraces early concepts of collective responsibility in "primitive society": "Assyria and Babylonia," "Persia," "China," "India," "Rome," "Greece," "Japan," the "Old Testament," "Islam," "Ireland," "Russia" and "Eskimos." This historical background to the evolution of the customs and practices of earlier legal systems deserves more description and discussion than the author provides (pp. 33-45). It would have been important here for the author to establish a link between the evolution of customary practice and the "modern" concept of state responsibility, in particular that of the criminal responsibility of states, as included in Article 19 of the ILC's draft principles of state responsibility.³

A significant portion of the debate concerning state criminal responsibility under international law derives from the difficulty of assessing collective responsibility of a penal nature when, under most legal systems, a corporate body or collective entity cannot be held criminally responsible. Indeed, the

DAS VÖLKERRECHTLICHE DELIKT (1920); C. DE VISSCHER, *LA RESPONSABILITÉ DES ÉTATS* (1924); C. EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* (1928); J. PERSONNAZ, *LA RÉPARATION DU PRÉJUDICE EN DROIT INTERNATIONAL PUBLIC* (1939). See also Münch, *Criminal Responsibility of States*, in 1 *INTERNATIONAL CRIMINAL LAW* 123 (M. C. Bassiouni ed. 1986); and Triffterer, *Responsibility for Crimes of State*, in 3 *id.* (1986).

² See, e.g., I. BROWNIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY*, pt. 1 at 32-33 (1983).

³ See [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 30, UN Doc. A/CN.4/SER.A/1980/Add.1.

concept of criminal responsibility, as it has emerged in contemporary Romanist-civilist legal systems, is one that does not recognize the notion of state or corporate or collective criminal responsibility, because it deems that criminal responsibility necessarily implies a penal sanction, and the function of a penal sanction is essentially deterrent, as well as rehabilitative. It is therefore difficult under that conception to see how a state, corporate entity or collectivity can be deterred or rehabilitated by the imposition of a criminal penalty, which, in the case of state criminal responsibility, could only be of a financial nature.⁴

While a number of common law-inspired systems have, in the last 50 years, evolved gradually to find a practical basis for imposing criminal penalties on corporate entities and collective bodies, it is also clear that the practical modalities that have developed do not rest on a doctrinal basis that distinguishes among the various concepts of "responsibility," "fault" and "risk."⁵

The examples since the turn of the century in which reparations have been imposed upon a state, in particular those imposed upon Germany by the Treaty of Versailles after World War I, have clearly demonstrated that the punitive compensatory measures imposed by the victorious upon the defeated could not have been deterring, nor have they demonstrated that they are "rehabilitative."⁶ They have, however, demonstrated the moral-ethical-legal dilemma of imposing upon an entire collectivity a responsibility and a financial or economic burden that also affect those who have not participated in the decision-making process that resulted in the violative act, as well as detrimentally affecting those who have opposed it. These examples also clearly highlight the dilemma of imposing long-term financial and economic burdens on future generations that could not be held accountable for the acts of the preceding one. But these questions are not discussed.

The author briefly discusses in chapter IV the concept of international crimes, but focuses only on some of the major crimes such as "crimes against peace," "war crimes" and "crimes against humanity," and in a separate chapter, "genocide" and "apartheid." Although international crimes extend beyond these five, the author does not explain why he excludes the others. Clearly, whenever a state fails to carry out its international obligations to prevent, prosecute, punish or extradite the offender under the Hijacking Conventions, the Kidnapping of Diplomats Conventions or the Taking of Hostages Conventions, state responsibility arises.⁷ In this respect, the maxim *aut dedere aut judicare* applies and a state's failure to act creates responsibility.⁸

⁴ I. BROWNIE, *supra* note 2.

⁵ Goldie, *Concepts of Strict and Absolute Liability and the Ranking of Liability in Terms of Relative Exposure to Risk*, 6 NETH. Y.B. INT'L L. 175 (1985).

⁶ See H. SCHACHT, *THE END OF REPARATIONS* (L. Gannett trans. 1931).

⁷ For a listing of these and other international criminal law conventions, see M. C. BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985* (1985).

⁸ Bassiouni, *Characteristics of International Criminal Law Conventions*, in 1 *INTERNATIONAL CRIMINAL LAW* 1 (M. C. Bassiouni ed. 1986).

The list of offenses to which this duty applies extends beyond the crimes with which he deals, and he fails to explain why he so limited himself (pp. 33-98).

In chapter V, the author discusses international criminal responsibility of states after the two world wars. While there is indeed significant relevance in the experience following World War I,⁹ there is practically no relevance to his thesis with respect to the Nuremberg and Tokyo War Crimes Trials. In these two trials, it was the principle of individual criminal responsibility that prevailed, not that of state criminal responsibility.¹⁰ Indeed, in both of these trials the notion of state criminal responsibility was intentionally discarded.

In chapter VI, the author describes the post-Nuremberg evolution of international criminal law. Again, while he describes the role of the United Nations with respect to "crimes against peace," "war crimes" and "crimes against humanity," it is uncertain what the relevance of the discussion is, since none of the post-Nuremberg and Tokyo efforts have had any bearing on the development of international criminal responsibility of states, which has been rejected.

In chapter VII, the author describes briefly (16 pages) the international criminal responsibility of national organs, focusing on responsibility of heads of states and governments, using, in particular, the Genocide Convention and the Apartheid Convention. There is, however, no established principle of international criminal responsibility under either Convention (pp. 55-79). Nevertheless, under these instruments, as well as under the Nuremberg and Tokyo principles, there is no immunity for heads of state or senior government officials, and the defense of "obedience to superior orders" has been eliminated (p. 80).¹¹ The impediment to the prosecution of the Kaiser after World War I¹² has been removed by the legacy of Nuremberg and Tokyo, as well as by these and other subsequent international instruments.¹³ Such responsibility remains individual and not collective.

In the next four chapters, the author discusses aggression and the illegal use of force under international law. The evolution of the definition of aggression from 1946 to 1974 is, however, not one that sheds much light on the concept of international criminal responsibility of states (pp. 80-98). Indeed, the definition of aggression has clearly moved away from the concept of the judicial adjudication of state responsibility, establishing instead a po-

⁹ H. SCHACHT, *supra* note 6; V. V. PELLA, *LA CRIMINALITÉ COLLECTIVE DES ÉTATS ET LE DROIT PÉNAL DE L'AVENIR* (2d ed. 1925).

¹⁰ For example, Justice Jackson, Chief Prosecutor at the Trial of the Major War Criminals, Nuremberg, asserted in his opening statement: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." 1 TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 34 (1947). See also TRIAL OF JAPANESE WAR CRIMINALS, DOCUMENTS 40 (1946); GA Res. 95 (I), UN Doc. A/64/Add.1 (1946).

¹¹ See *supra* note 10.

¹² J. WILLIS, PROLOGUE TO NUREMBERG 98-113 (1982).

¹³ See M. C. BASSIOUNI, *supra* note 7.

litically determined responsibility of states by the Security Council.¹⁴ As a result, one can conclude that there has been a regression in the efforts of the world community regarding state responsibility from the Treaty of Versailles to the present position.

In chapter XII, the author discusses the legal status of an international criminal jurisdiction and the evolution of the efforts to create an international criminal court.¹⁵ While the efforts of writers after World War I focused on the creation of an international criminal court, that court was essentially to have criminal jurisdiction over individuals.¹⁶ That is also clearly apparent in the work of the United Nations in the 1951 and 1953 draft statutes for the creation of an international criminal court.¹⁷ None of these attempts, however, have held states criminally responsible.

Finally, the author goes into the criminal prosecution of states and the criminal conduct of states, which he covers in the last two chapters, focusing on Article 19 of the draft articles on state responsibility.¹⁸ In these two chapters, the author could have articulated more clearly a doctrine or theory of state criminal responsibility in relationship to both international policy and traditional concepts of criminal responsibility. Since the author seeks to explain, support and enhance the work of the ILC, he should have carefully analyzed Article 19, particularly with respect to the distinction between "crimes" and "delicts," those violations deemed to fall under either one of these two categories, and the degree of specificity of Article 19 regarding the traditional principles of legality in criminal law, *nulla poena sine lege*, *nullum crimen sine lege*.¹⁹ He fails to do so. These two chapters are more descriptive than analytical.

¹⁴ GA Res. 3314 (XXIX), 29 UN GAOR Supp. (No. 31) at 142, UN Doc. A/9631 (1974). See also B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION* (2 vols. 1975).

¹⁵ For a historical review, see B. FERENCZ, *supra* note 14.

¹⁶ See B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT. A STEP TOWARD WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS* 399 (2 vols. 1980). See also Report of the Committee on International Criminal Jurisdiction, 7 UN GAOR Supp. (No. 11), Ann. 1 at 21, UN Doc. A/2136 (1952); Report of the 1953 Committee on International Criminal Jurisdiction, 8 UN GAOR Supp. (No. 12) at 25, UN Doc. A/2645 (1953). This was also the case with respect to the report prepared by this writer, Draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, UN Doc. E/CN.4/1426 (1981). The first draft treaty for the creation of such a court was contained in the 1937 Convention for the Creation of an International Criminal Court, LEAGUE OF NATIONS O.J. Spec. Supp. 156 (1938), which was opened for signature on Nov. 16, 1937, but never entered into force because of insufficient ratifications. See 7 M. HUDSON, *INTERNATIONAL LEGISLATION (1909-1945)*, at 878 (1972). See also Art. IV, Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277; and Art. II, International Convention on the Suppression and Punishment of the Crime of *Apartheid*, GA Res. 3068 (XXVIII), 28 UN GAOR Supp. (No. 30) at 75, UN Doc. A/9030 (1973) (both refer exclusively to individual criminal responsibility).

¹⁷ See note 16 *supra*.

¹⁸ See Art. 19 of the draft articles on state responsibility, *supra* note 3; Report of the International Law Commission on its Thirty-sixth session, 39 UN GAOR Supp. (No. 10), UN Doc. A/39/10 (1984).

¹⁹ Bassiouni, *Nuremberg Forty Years After*, 18 CASE W. RES. J. INT'L L. 261 (1986).

The subject of this book is timely, important and of significant contemporary relevance. The author has adequately described the efforts of the international community, but more analysis and searching inquiry would have been helpful in advancing the cause he advocates. International criminal responsibility of states, like any other aspect of international criminal law, requires significant grounding in both international law and criminal law in order to merge those two disciplines. To merge concepts of international law and policy with criminal law and criminal justice is indeed a difficult task. What is needed in the area of international criminal responsibility of states is a new doctrinal basis and theoretical approach to be applied to the various international crimes so that a more cohesive approach to this entire area can be developed.²⁰

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The Future of the International Law of the Environment. (Workshop held at The Hague, 12–14 November 1984.) Edited by René-Jean Dupuy. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xxii, 514. Dfl.155; \$59.50.

In their series of workshops on various questions of contemporary international law, the Hague Academy of International Law and the United Nations University jointly organized in November 1984 a workshop on "The Future of the International Law of the Environment." The meeting was a follow-up to a previous workshop by the Academy on "The Protection of the Environment and International Law" held in 1973 in the wake of the Stockholm Conference on the Human Environment. The communications (either in English or French) to the workshop, as well as summaries (both in English and French) of its discussions, are published in this volume edited by the General-Secretary of the Hague Academy, Professor René-Jean Dupuy.

The workshop was attended by an estimable group of primarily legal experts, 42 altogether. They included diplomats and international officials as well as university professors and members of the World Court.

Referring to the 1973 meeting, Dupuy outlines in his introductory statement the task of the 1984 workshop as follows:

We could draw up two balance sheets: a material balance sheet in the sectors where a receipt can be seen—numerous diplomatic instruments being concluded in the meantime—but also a spiritual balance sheet in the order of minds. Has the consideration of ecological solidarities really progressed substantially since that time? Posing such questions well shows that the prospects ought to appear quite naturally from the balance sheet we shall be led to draw up [p. 21].

Accordingly, the book is divided into three main parts: "The Review," "The

²⁰ See, e.g., Bassiouni, *supra* note 8, at 1–166.

Great Challenges" and "Avenues of Action," each containing communications of the participants and a summary of the respective discussions. The book ends with thought-provoking conclusions by Dupuy.

The contributions appear to be somewhat uneven. This applies, in particular, to their length, but also, to some extent, to their substance. Although this disparity might be seen as a certain weakness in the project, it does provide it with a degree of flexibility. While briefer contributions may lack depth, they may nevertheless raise interesting issues previously neglected or open new avenues of approach to old problems. Reference may here be made to, among others, the contribution by Elisabeth Mann Borgese on *The Protection of the Marine Environment in the Case of War*, where she draws attention to the environmental damage resulting in 1983 from the bombing of offshore oil wells in the Persian/Arabian Gulf. "Could one think of protocols, incorporated into the Regional Seas Action Plans, providing for relief of environmental disaster, not only in case of peace but also in case of war?" Mann Borgese inquires (p. 107).

Likewise of interest are the reflections of S. Van Hoogstraten on *The Future of Endangered Species*. It is surprising to learn, for instance, that Hong Kong and Japan together imported in 1978 raw ivory from the tusks of an estimated 60,000–70,000 elephants and that as late as 1983 the total imports of raw ivory into those two countries were as high as 754 tons. One would also concur with Van Hoogstraten's conclusion to his brief discussion of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora that it is not only the trade in endangered species but equally the protection of their natural habitat that requires our attention.

Some of the contributions offer comprehensive accounts of various activities in the environmental field. Pierre-Marie Dupuy (in *Le Droit international de l'environnement et la souveraineté des Etats*) describes the present and emerging norms of international environmental law, including both the "hard" and the "soft" law. Peter H. Sand reviews the promotion and development of environmental law in the United Nations Environment Programme. Sand's contribution also includes tables on the participation of states in conventions protecting the environment. In terms of information, the most impressive contribution is that of Henri Smets (*Indemnisation des dommages exceptionnels à l'environnement causés par les activités industrielles*). His discussion of liability for exceptional environmental damage caused by industrial activities includes data on numerous incidents in different parts of the world, whether on land, at sea or in the air. Indemnification for damage is studied from different angles with reference to both national and international law.

It is hard to avoid referring to well-known facts and data or repeating views already put forward on earlier occasions. In the environmental field, recent years have witnessed a multitude of writings and symposiums aimed at the promotion of environmental regulation. The importance of the issue, however, makes up for the occasional overlaps. Moreover, the volume also provides a remarkable measure of information not readily available elsewhere and draws attention to various problems of continuing relevance. An example is the contribution by Eckard Reh binder on *Environmental Protection and the*

Law of International Trade (with particular reference to the export of hazardous chemicals and transfrontier disposal of wastes). Also, the environment-development axis, although well recognized, has often been left to summary treatment, not infrequently by the representatives of developed economies. Therefore, it is of particular interest to share the "perspective" from developing countries as to environmental law offered by Asit K. Biswas (*Environment and Law: A Perspective from Developing Countries*).

An old question—and the subject of much discussion in the past—is treated in an innovative way by Johan G. Lammers in his contribution on "Balancing the Equities" in *International Environmental Law*. He inquires "whether and to what extent instances of pollution between sovereign States are . . . in international law subjected to a process of 'balancing the equities', i.e., to a process which gives due consideration to the interests of both the State of origin and the victim State of transfrontier pollution" (p. 153). He notes that an amazing number of principles and concepts have been proposed to govern the question of the prohibition under international law of transfrontier pollution. As an illustration of such proposals, he enumerates a total of 25 relevant principles ranging from absolute territorial sovereignty to absolute territorial integrity. The principle that, in his view, best governs instances of transfrontier pollution is what he calls the *mitigated-no-substantial-harm principle*. Under this principle, elements such as the exceptional sensitivity of the interests affected, questions of due diligence on the part of the state of origin and possible disproportion between the interests involved are to be taken into account in the determination of the prohibition of particular polluting activities. Lammers's discussion offers an interesting introduction to an approach, which may, in a more pragmatic manner than many others, take us forward in the labyrinth of state responsibility for transfrontier pollution.

Other contributions, too numerous to discuss or even list here, are of similar interest. While the papers presented to the workshop correspond well to the high level of its expertise, the summaries of the respective discussions do not add very much to the volume. Apparently, spontaneous interventions make their point best at the very moment of the discussion; printed summaries may not fully reflect the colloquial atmosphere of the workshop. In addition, about one-fourth of those present seem not to have actively participated in the discussion.

This volume is further proof of the valuable work of the Hague Academy. Similarly, the United Nations University deserves recognition for its role in the organization of the workshop. The book provides ample source material in the environmental field, draws attention to a wide variety of legal questions and searches for new ways to tackle the problems of effective regulation of the world environment. It is a notable addition to the abundant, but hardly excessive, literature on international environmental law. It should be of use not only to specialists in international law but also to those who entertain a more general interest in international relations.

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The Mars Project: Journeys Beyond the Cold War. By Spark M. Matsunaga. New York: Hill and Wang, 1986. Pp. xix, 216. \$17.95.

"Where there is no vision, the people perish." So writes Arthur C. Clarke, space age author and conceptualist, in his foreword to Senator Spark Matsunaga's book *The Mars Project*.

Chronicling his legislative attempts to give Congress and the nation a vision beyond the cold war atmosphere, Matsunaga has given us a short, readable book. However, what at first glance seems like quick fare turns out to be a thought-provoking study that leads his readers to think and rethink their notions on the conduct of foreign policy. Drawing upon his heritage in both Eastern and Western philosophy, Matsunaga envisions the conduct of foreign policy from a broader framework than has been the case in the United States.

In the 3-year period from 1982 to 1985, Matsunaga introduced seven progressive space cooperation resolutions. Their texts are included in the appendixes. In a brief description of the process and import of congressional resolutions, the senator notes the difficulty of taking a document written "in dense legal language" and imbuing it with "life" and "flexibility"—definitely a challenge to any legislator. The first resolution he introduced called upon the President to initiate talks that would explore the potential for an international space station, free of weapons. It was followed by one that called for a renewal of the 5-year space cooperation agreement between the United States and the Soviet Union that had been negotiated in 1972 and renewed in 1977. The United States pulled out of this agreement when it came up for renewal in 1982, linking it to the imposition of martial law in Poland. In addition to establishing a framework for cooperation, the 1977 agreement called upon the parties to strengthen the legal order in space by encouraging further development of international space law.

The space cooperation resolution was introduced just 13 days before President Reagan's now famous—or infamous, depending on one's point of view—"Star Wars" speech. Matsunaga stresses the importance of this resolution as part of a broader foreign policy for the United States. He views cooperation as a component of a long-term policy that would be action-oriented rather than formulated in reaction to what the Soviet Union might do. In chapter 8, entitled "Beyond the Opposites," the senator combines his Eastern and Western heritages in a discussion of moral and dynamic equivalence. In their negative manifestations, both of these concepts result in a narrow, unrealistic, self-created view of the world. Thus, much of the debate that takes place over any major policy issue is polemical rather than reasoned. The debaters, following predictable ideological lines, confuse rather than shed light on the problem.

Describing the logic behind his resolution, the senator says,

It seemed to me that, from a legislative point of view, the space cooperation resolution was unique because of the special emphasis it placed on cooperation as a *foreign-policy objective* complementary to arms-control negotiations and weapons buildup. But in a nation managed by lawyers trained in adversary proceeding (myself included) and businessmen

schooled in tense competition, the *idea* of a cooperation inspired a certain uneasiness. We admired it in principle, yet we were far more comfortable, innovative, and lively when involved in an adversarial situation [pp. 27-28].

For this reason, he introduced a companion resolution looking to international agreements on space rescue. The successful operation of the American, Soviet, French and Canadian COSPAS/SARSAT search-and-rescue satellite system has given proof of the advantages of cooperation.

Matsunaga is a voice of sanity in an area where sanity can be conspicuously absent. He recognizes that the new frontier of space offers us an opportunity to begin a new era in our relationship with the Soviet Union. He reminds us that in the late 19th century both Robert Goddard in the United States and Konstantin Tsiolkovsky in Russia had a scientific and human vision of space exploration that transcended political "realities." Their destination was Mars, the very planet the senator would now have us explore together. In Senate Joint Resolution 46, of February 7, 1985, he proposed that NASA explore the possibilities for cooperation with the Soviet Union in the exploration of Mars. Both nations have Mars missions planned and both can contribute to, as well as gain from, a joint mission. In the endorsements that the senator received for his idea, the respondents spoke of the "complementary technical capabilities" of the United States and the Soviet Union.

The senator's vision is inspired, in a legislative system that is generally uninspiring. One hopes that he can now attack the practicalities of his vision. The Soviet Union has been planning its exploration of the mysteries of outer space since the time of Tsiolkovsky. The United States, on the other hand, has difficulty with long-term planning in any policy area. Our year-to-year budget process is not conducive to the long lead times required for space missions. Neither is our system of government, where a change of administration seems to preordain a change in plans and programs, for either political, ideological or egoistic reasons. Thus, we cannot decide whether to commit our resources to manned or unmanned flights into space; when our ventures are scientific and when they are military; or even to what extent we are going to commit ourselves to outer space at all. The senator's suggestion that the space program be under the aegis of the Air Force is interesting for its recognition of the fact that military and civilian uses and users are intertwined.

This brings me to my one area of disagreement with Matsunaga. He overemphasizes and overuses the term "democracy" in referring to the advantages of such a system in the exploration of space. Democracy is a political ideology and is, therefore, not the best term to use when attempting to achieve international cooperation. It disregards not only the Soviet Union, but also many other nations that are increasingly capable of utilizing outer space. We in the West—and particularly in the United States—need to learn once and for all that not every nation relates to Western law and Western concepts. We need to find some new terms that are more applicable to the global situation in which we must operate. It should also be noted that democracy has become the international "in" concept: every nation

wants to appear democratic. It is used by almost every government to describe itself, no matter how repressive its system. In this sense, democracy has no meaning and defeats the senator's intent in using it.

In Senate Joint Resolution 177, of July 17, 1985, the senator proposed that the President endorse the concept that 1992 be declared an International Space Year. The year 1992 was chosen because it is the 500th anniversary of the discovery of the Americas by Columbus and the 35th anniversary of the International Geophysical Year, which began the space age. It is also the anniversary of the first launching of an artificial satellite and the 75th anniversary of the Russian Revolution. This proposal moved quickly through Congress, on to NASA for study and then to President Reagan for his approval. The United States then submitted the idea to the international Committee on Space Research (COSPAR) where it received a positive response. It is the intent of the United States that it will eventually go to the United Nations to be officially declared an international year.

Matsunaga has offered us a vision that can carry the United States into the next century. He recognizes that the historical openness and ingenuity of the American system and the American people can encourage the design of an era of international cooperation in outer space. The challenge of this new frontier requires such openness and cooperation. The alternative is the extension of the arms race into outer space.

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Ocean Yearbook 5. Edited by Elisabeth Mann Borgese and Norton Ginsburg. Chicago and London: The University of Chicago Press, 1985. Pp. xvi, 544. Index. \$49.

This work, sponsored by the International Ocean Institute of Malta, is the fifth in a series of volumes of collected essays and documents concerning ocean development and affairs. The present volume covers nine general subjects: the 1982 UN Convention on the Law of the Sea and its Preparatory Commission, living resources, nonliving resources, transportation and communication, marine science and technology, the environment, coastal management, military activities and regional developments.

In the section on the 1982 Convention on the Law of the Sea, Elisabeth Mann Borgese provides an overview of the first two sessions of the Preparatory Commission for the International Sea-Bed Authority in *Notes on the Work of the Preparatory Commission*. This piece is followed by S. P. Jagota's short description of the history and contents of the 1982 Convention in *The United Nations Convention on the Law of the Sea, 1982*. It would have been preferable if the sequence of these two pieces had been reversed.

Under "Living Resources," John E. Bardach and Penelope J. Ridings have written an excellent primer on tuna, the industry and its management, in *Pacific Tuna: Biology, Economics and Politics*. Maxwell Bruce, in the section

on "Non-Living Resources," surveys a variety of current, experimental and potential ocean-derived energy recovery systems such as ocean thermal energy conversion (OTEC), winds and hydrocarbons, in *Ocean Energy: Some Perspectives on Economic Viability*.

The fourth section, "Transportation and Communication," contains essays by Yehuda Heyuth on *Seaports: The Challenge of Technological and Functional Changes* and Thomas S. R. Topping on *International Action Against Maritime Fraud*. Professor Heyuth's essay stresses the increasing intermodal nature of international transport involving inland regions, ports and carriers. The latter essay briefly recounts actions on this problem taken within international bodies such as UNCTAD, the IMO and the International Chamber of Commerce.

The next section, "Marine Science and Technology," sets forth three aspects of international cooperation in this field. In *On the Nature of a Model Global Maritime Research Organization*, Norton Ginsburg proposes the establishment of a global marine science organization that would comprehensively deal with research, monitoring, data storage, evaluation and training after first identifying the problems of using existing international bodies for this purpose. Velimir Pravdic, in *International Cooperation in Marine Sciences: The Non-governmental Framework and the Individual Scientist*, describes the role that independent scientists may play in protecting the marine environment such as through the Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP) and in the environmental impact assessment process. Finally, Roger Revelle, in *The Need for International Cooperation in Marine Science and Technology*, stresses the need for international cooperation in addressing problems caused by human use of the oceans; he deals with such matters as fisheries, offshore oil and gas, coastal zone protection and development, and ocean recreation and tourism.

Under the sixth heading, "Environment," Edward P. Goldberg discusses the increasing role of the ocean as a waste reservoir and the attendant problems such as with cadmium, in *The Oceans as Waste Space*. The other article in this section, *A Regional Approach to Marine Environmental Problems in East Africa and the Indian Ocean* by Meera Pathmarajah and Nikki Meith, provides a good description of the physical features of these areas, their resources and actions taken under the UNEP Regional Seas programs for the East African region and the South Asia seas. Maps would have made the article much easier to follow.

The East African region is further considered under the next section on "Coastal Management," in *Catchment Land Use and its Implications for Coastal Resource Conservation in East Africa and the Indian Ocean* by Random Dubois. It focuses on Kenya's Athi River Basin and provides a graphic description of the coastal environmental impacts resulting from human activities, including land use and industry, in the basin area or catchment.

Section 8, "Military Activities," contains pieces by C. F. Barnaby on *Superpower Military Activities in the World's Oceans* and by B. M. Jasani, *A Note on Ocean Surveillance from Space*. The former gives a detailed accounting of the nature and extent of U.S. and Soviet naval capabilities, nuclear and non-

nuclear, surface and submarine. The latter describes the satellite ocean surveillance capabilities of the United States and the USSR and discusses the role of nuclear-powered satellites.

The final section, "Regional Developments," is devoted to a more political discussion. Daniel T. Dzurek, in *Boundary and Resource Disputes in the South China Sea*, provides a concise and informative examination of the complicated sovereignty and maritime boundary disputes in that region. M. C. W. Pinto, in *Preface to a Proposed Indian Ocean Scientific Conference*, outlines the role that he believes international cooperation in marine scientific research may play in promoting the Indian Ocean zone of peace.

The rest of the volume is composed of appendixes, including reports from governmental and nongovernmental organizations concerned with ocean affairs such as the World Meteorological Organization and the Law of the Sea Institute, and a selection of documents, including portions of the 1982 Convention on the Law of the Sea. It is noteworthy that the appendixes fail to include reports or documents from the IMO or UNEP, two of the most active international bodies in marine affairs. Finally, the book contains a number of tables, including statistics on world fish catch, offshore oil production and world shipping tonnage.

Overall, *Ocean Yearbook 5* is an interesting and varied collection of contributions by academics and international and national civil servants on technical aspects of ocean affairs and development. For the most part, the contributors are not legal specialists. In this regard, the *Yearbook* is not for readers looking for a work strictly on oceans law.

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The Maritime Political Boundaries of the World. By J. R. V. Prescott. London and New York: Methuen, 1986. Pp. xv, 377. Indexes. \$48.

Maritime Boundary. By S. P. Jagota. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xx, 388. Dfl.175; \$57.50; £48.50.

Scholarly interest in the drawing of boundaries, which dates mainly from the period between the world wars, aims partly at avoiding wars and other conflicts over boundaries. However, confrontations along boundaries continue to develop because of ineptness of allocation (a general statement of the area to be taken by each party and the approximate location of the boundary), delimitation (the exact statement of the location of the boundary by means of a map, with explicit references to the relevant natural and cultural features), demarcation (the actual identification of geographic features along the line of delimitation) and changes in conditions along particular boundaries, either during their evolution or since their demarcation.

Disputes frequently occur, therefore, where shared boundaries are inaccurately or ineffectively determined. Faulty determinations by earlier efforts often remain dormant until the accurate delimitation of a given bound-

ary becomes unavoidably necessary. Even the mere whisper, for example, of the presence of petroleum resources, or pending drilling and exploration plans, reveals the slightest flaw in an existing or partially delimited boundary. The realities of randomly concentrated and limited resources, complicated by political considerations, make the issue of marine boundary delimitation increasingly difficult to settle on an amicable basis. Even so, the past and recent resolution of many maritime boundaries provides excellent exercises in reasonable and intelligent delimitation.

Perhaps the most critical recent study of international boundaries and the principles of intelligent boundary drawing emanates from the pen of a political geographer, J. R. V. Prescott, Reader in Geography at the University of Melbourne, Australia. Prescott's recent treatise on marine boundaries, *The Maritime Political Boundaries of the World*, culminates a professional odyssey in boundary expertise, evidenced by such previous works as *The Geography of Frontiers and Boundaries* (1965) and *Maritime Jurisdictions in Southeast Asia: A Commentary and Map* (1981).

Prescott effectively demonstrates the complex intertwining of questions of international law with problems of political geography and coastal geomorphology at each stage of the boundary determination process, i.e., allocation, delimitation and demarcation. This appreciation for the geographical setting is, unfortunately, lacking in the understanding of many lawyers and legal scholars who focus too narrowly on the technical issues of treaties, state practices and national legislation. In the first part of the book (chs. 2-5), Prescott addresses the physical nature of coasts and their influences on national maritime claims, methods for drawing baselines from which those claims are measured, the circumstances complicating the delimitation of marine boundaries and the special problems of international maritime zones such as the high seas and deep seabed. Amply illustrated and well referenced, this section presents a comprehensive overview of the relevant marine resources law, which will interest lawyers and geographers alike.

The second part of Prescott's book (chs. 6-14) focuses on specific maritime regions, e.g., the south Pacific Ocean, the Baltic, the North and Irish Seas, and the Caribbean Sea and Gulf of Mexico. In this excellent study in coastal-political geography and legal geomorphology, the author first presents the geographic setting, then reviews existing marine boundaries and concludes with pending maritime boundary problems and disputes for each region. As a political geographer, well versed in international law, Prescott presents an always beneficial, and sometimes rather unique, interdisciplinary vantage point from which to view many of the world's problems regarding marine boundaries and the resources they inherently allocate.

Prescott's treatise on maritime boundaries enjoys the further recommendation of being both authoritative and readable. As both a political geographer and an international lawyer who has personally been directly involved in a number of marine boundary determinations, this reviewer attests to the definitive nature, literary quality and high reference value of *The Maritime Political Boundaries of the World*.

Complementing Prescott's excellent treatise on the coastal-political geography of marine boundaries, *Maritime Boundary*, by S. P. Jagota, provides a thorough historical review of the legal aspects of marine boundary determinations between 1945 and 1983. Unlike Prescott, Jagota confines his study to those boundary matters that have been concluded. An outgrowth of lectures presented by the author at the Hague Academy of International Law in 1981, the book offers a rather comprehensive exposition of boundary agreements, arbitrations and judicial decisions. The first section gives an overview of the developing law of outer maritime zones and delimitations between states, from the ruminations of the International Law Commission (1949-1956), through the 1958 UN Conference on the Law of the Sea, to the Third UN Conference on the Law of the Sea (1973-1982). Some attention is also given to such technical and cartographic aspects of delimitation as map scale, type of map projection and geodetic datum. However, it is the historical development of the law itself that provides the greatest benefit to the reader.

The second section of the book concerns specific treaties and agreements. While somewhat organized by geographical regions, the discussion mainly involves documents and determinations contributing to the development of marine boundary law and policy. A review of judicial and arbitral decisions quite logically follows this discussion of treaties and conventions. The reader naturally anticipates the author's treatment of the *North Sea Continental Shelf Cases* (1969) and the recent *Case Concerning the Continental Shelf* between Tunisia and the Libyan Arab Jamahiriya (1982). This topical sequence of legal histories concludes by detailing the deliberations of the Third UN Conference on the Law of the Sea.

The author frequently quotes the pertinent legal documents, e.g., convention articles, thereby affording the reader direct access to primary source material. Indeed, rather extensive appendixes reproduce much of the text of many referenced treaties, agreements and related legal documents. *Maritime Boundary* is adequately illustrated and benefits from a comprehensive compilation of references. These qualities lend it usefulness as a reference work on marine boundaries.

In conclusion, the reviewed works by the political geographer, Prescott, and the international lawyer, Jagota, together provide a thorough review of past and existing marine boundary determinations, which should prove exceedingly useful to anyone interested in marine resources law and maritime policy. If this reviewer may be permitted to end on a personal note, my only complaint stems from the fact that these books were not available a few, short years ago when I taught coastal-political geography, i.e., the geographical aspects of the law of the sea. As prospective textbooks, they combine to outline an interesting course of study. Indeed, after reading these excellent volumes, I am almost persuaded to return to academia!

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Of the Louisiana Bar

Rohstoffgewinnung in der Antarktis. Völkerrechtliche Grundlagen der Nutzung Nichtlebender Ressourcen. By Ulrich J. Nussbaum. Vienna and New York: Springer-Verlag, 1985. Pp. xiv, 236. Index. DM 98.

Time and again, scientists and economists have noted that there is no reason to expect mining activities of any important scope in Antarctica in the foreseeable future. No hard minerals in economically exploitable quantities have yet been discovered in the Antarctic land areas. Only large high-grade deposits of high-value minerals could cover the tremendous costs of their exploration, exploitation and transportation. The probability of discovering such deposits, however, remains very low. Therefore, the hopes and expectations concerning the nonliving resources of this continent focus on the possibility that the Antarctic continental shelf may contain oil or natural gas in economically worthwhile quantities. These hopes were stirred by a few traces of methane, which were discovered more than a decade ago, whereas the expectations are mainly based on analogies drawn from the geological and geomorphological structure of continental shelf areas in other parts of the world. In addition to that, the exploration for and exploitation of hydrocarbons on the Antarctic continental shelf would have to face extremely difficult technical problems unknown even to the offshore activities in Arctic waters. Moreover, only a very considerable increase in the price of oil could make offshore exploration and exploitation in Antarctica economically attractive.

In his doctoral dissertation, written at the law department of the University of Saarbrücken, Dr. Nussbaum describes this factual situation in a brief first chapter (pp. 8–28). This provides readers who are not experts in Antarctic affairs with a useful survey of certain information concerning the geography, geomorphology, climate, flora and fauna of Antarctica, as well as the economic aspects of any mineral exploitation there. In the latter context, the author explains the presence of, and expectations with regard to, mineral deposits in Antarctica, and the economic constraints on their exploitation. Nussbaum concludes, from the present state of knowledge, that mineral exploration and exploitation would probably start on the Antarctic continental shelf (p. 27), an estimation that is widely shared by scientists and mining experts. Thus, the facts show that the legal questions involved in the exploration and exploitation of Antarctic mineral resources are still hypothetical.

In spite of this altogether bleak outlook for any mineral exploration and exploitation in Antarctica, the Consultative Parties to the Antarctic Treaty of 1959 began consultations on this subject at their Seventh Consultative Meeting in London in 1972. And they have intensified their endeavors to conclude an international agreement on Antarctic mineral resources ever since the "Question of Antarctica" became a topic on the agenda of the General Assembly of the United Nations in 1983. Despite vigorous opposition, especially from certain Consultative Parties with territorial claims in that continent, the majority of the General Assembly demanded in several

resolutions that the natural resources of Antarctica serve the benefit and interests of mankind as a whole.

Taking account of this political situation in a brief introduction (pp. 1-7), Nussbaum concentrates in his legal chapters on whether or not the Consultative Parties to the Antarctic Treaty could effectively claim under international law a regulatory power, on the basis of which they could adopt rules concerning the Antarctic mineral resources that would legally bind third states. Their claim to a regulatory power *erga omnes*, as Nussbaum calls it (p. 5), was apparently never expressly stated by the Consultative Parties. They have, however, repeatedly referred to the "special responsibilities of Consultative Parties" as, for example, in the Preamble to their Resolution IX(1) (p. 205). But the opposition to placing the "Antarctic Question" on the agenda of the UN General Assembly relied mainly on the territorial claims of certain Consultative Parties and not on any common power. Nevertheless, their claim to a regulatory power *erga omnes* is a subject of some scholarly discussion, which is principally interested in the question whether a power of this kind could even exist in international law.

In accordance with his theoretical subject, the author chooses an academic approach: in the second chapter (pp. 29-103) he examines four possible reasons for a regulatory power *erga omnes* of the Consultative Parties, which are mentioned but not fully explored in the legal literature. According to the first conception, the essential parts of the Antarctic Treaty form customary rules of international law, and the parties to that Treaty are considered to have exclusive jurisdiction in the area south of 60° south latitude that is to be respected by third states (p. 30). Nussbaum regards the present number of parties to the Antarctic Treaty as not sufficient to meet the requirement of a very widespread and representative participation to create a rule of general customary law (p. 34), and he rightly points out that such a customary rule would be against the interests of the claimant states because it would prejudice their territorial claims for the future (p. 36).

According to the second conception, third states are bound by way of acquiescence because they have silently accepted the claim of the Consultative Parties to regulate Antarctic matters *erga omnes*. Nussbaum is inclined to accept this thesis with respect to living resources (p. 48)—a questionable opinion, because the majority of states that have no fishing fleet able to fish in Antarctic waters could hardly be required to object to the Convention on the Conservation of Antarctic Marine Living Resources of 1982. Moreover, there are in fact fishing vessels in Antarctica flying the flag of the Republic of China (Taiwan), to which the latter Convention does not apply. But with respect to the nonliving resources, he rightly points out that third states could not be bound at all by acquiescence before the Consultative Parties have concluded an agreement on Antarctic mineral resources because the Antarctic Treaty of 1959 does not deal with this matter (p. 49). In addition, the deliberations of the UN General Assembly on the "Antarctic Question" prove, on the contrary, that there is no silent acceptance of the Consultative Parties' regulatory power *erga omnes*.

As a third conception, Nussbaum discusses the possibility of making the territorial claims of the seven claimant states, Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom, the basis of a regulatory power *erga omnes*. Apart from the fact that this would not include the unclaimed sector of Antarctica, the author aptly shows that a condominium of the Consultative Parties would require an amendment of Article IV of the Antarctic Treaty (p. 65). One also can agree with him that, unlike the deep seabed and outer space, Antarctica is not open to an application of the common heritage principle because it is subject to occupation and appropriation, and there already exist, in fact, inchoate titles of the claimant states (p. 73 ff.). In this context, Nussbaum also rejects the possibility of a functionally limited condominium (p. 78 ff.), and he shows that a coimperium would by no means be a sufficient basis for a regulatory power *erga omnes* (p. 79 ff.).

Fourth, the author turns to the concept of the trust, showing that the Consultative Parties do not represent trustees for mankind as a whole (p. 89). Concluding his comprehensive and thoughtful analysis, Nussbaum nevertheless regards the application of the international trusteeship system of the United Nations (chapters XII and XIII of the UN Charter) as a theoretical possibility for the future, adding, however, that this would be contrary to the interests of the Consultative Parties (p. 98).

Nussbaum's own attempt to find a more convincing legal reason for the Consultative Parties' regulatory power *erga omnes* with respect to Antarctic mineral resources is developed in the third chapter (pp. 104-78). His reasoning consists of two consecutive steps: the recognition of the Antarctic Treaty as a "status treaty" or "objective regime," and the requirement of third states to respect such a treaty. The crucial issue of this line of thought is whether the Antarctic Treaty is to be considered a status treaty, and what that would mean. Nussbaum adopts the concept of a status treaty as it is laid down in E. Klein's book on *Statusverträge im Völkerrecht* (1980). The basic idea behind this concept is that the accumulation of "territorial competence" (*territoriale Zuständigkeit*) and a "claim to serve the common interest" (*Gemeinwohlbehauptung*) amount to a legal requirement ("*Obliegenheit*" or *obligatio in rem suam*) of third states to respond to the claim, or otherwise to lose their right to participate in the definition of the common interest (p. 107). Nussbaum applies the different elements of the concept of a status treaty to the Antarctic Treaty, showing that the latter is a "territorial treaty" as it refers to a certain territory (p. 109), that it serves the common interest (p. 117), and that the Consultative Parties intended to establish an objective regime in Antarctica (p. 123). However, the last essential element of the status treaty, and its most crucial one, is that of the "territorial competence" of the Consultative Parties with respect to Antarctica (p. 127 ff.). One has to agree with Nussbaum as well as with Professor Klein that there exists no competence of this kind with respect to an area that is *res nullius*, as, e.g., the deep seabed (p. 128). But I disagree with their opinion that there is such competence of the Consultative Parties with respect to Antarctica, which

represents a *terra nullius* area, because the very basis of "territorial competence"—if this is to have any legal effect *erga omnes*—is a valid title to territory. Thus, "territorial competence" as an essential element of the status treaty is only another term for territorial jurisdiction over the respective area, as we have it in the well-known examples of these treaties such as the Spitzbergen/Svalbaard Treaty of 1925. Of course, each claimant state can hold its territorial claim in Antarctica against any third state that would become active within the claimed territory because Article IV of the Antarctic Treaty, which "shelves" the territorial claims, is only applicable between the states parties. But as these territorial claims are not recognized, they amount at most to inchoate titles. As an inchoate title is not exclusive, it can compete with another inchoate title, as, for example, the British does with the Argentine and Chilean ones. In addition, it can also compete with the titles of third states with respect to mineral resources on the continental shelf, which are based on discovery and effective appropriation of the resources. Moreover, as "territorial competence" could not entitle a state to more than the present inchoate titles do, nonclaimant states lack any territorial competence with respect to Antarctica, and there is no common territorial competence of the Consultative Parties. Unlike Nussbaum (p. 131), I am of the opinion that Article IV of the Antarctic Treaty has some relevance in this context, because the provision that "[n]o new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force" applies also to a claim directed exclusively against third states, as the author himself concedes (p. 129 n.87). And finally, it is difficult to see how the effective political measures of the Consultative Parties to keep other states or international organizations out of Antarctic matters until 1983 could give rise to a "territorial competence" of the Consultative Parties (p. 132). It seems to me that the principle of effectiveness can only enforce an existing territorial claim, but it cannot create it.

The second step in Nussbaum's line of reasoning is the requirement that third states have explicitly or silently to accept the Consultative Parties' claims to a regulatory power *erga omnes* in Antarctica if these claims become effective (p. 139 ff.). The author regards the 20 years of silence of general state practice in this context, unlike the situation of acquiescence, as tacit acceptance (p. 140). But he concedes that any new claim to regulate the mineral resources *erga omnes* would require an additional acceptance by third states because such acceptances would form not only an explication of the object and purpose of the Antarctic Treaty, but a substantial amendment of the existing Antarctic Treaty System involving different interests (p. 157).

By pointing specially to the acceptance of the Consultative Parties' claim to a regulatory power *erga omnes*, Nussbaum has certainly met the essential point of the whole matter. One could perhaps have followed other strands of argumentation into the dark areas of this issue, adding certain other aspects such as the fact that the Antarctic Treaty System in its essential features furthers the purposes and principles of the UN Charter. But beyond

doubt, his profound discussion of the question of acceptance has helped to clarify central aspects of the issues involved, thus contributing considerably to the ongoing scholarly discussion.

In a short fourth chapter on the legal status of the Antarctic continental shelf (pp. 179-99) the author shows that the continental shelf concept applies in Antarctica too. Nussbaum concludes his fine, scholarly work with a brief prospective view (pp. 200-02). It ends with the slightly optimistic estimation that the future regime for Antarctic mineral resources is also likely to gain general acceptance (p. 203). Included are three documentary annexes and a map of Antarctica, as well as a comprehensive list of the relevant literature and an index. The book lacks an English summary, however, and one hopes that Nussbaum will publish the essential results of his research and his thoughts in a separate article in English.

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Algumas Reflexões sobre a nacionalidade das sociedades em direito internacional privado e em direito internacional público. By António Marques dos Santos. Coimbra: Livraria Almedina, 1985. Pp. 244.

In this study on the nationality of companies under private international law and public international law, Professor António Marques dos Santos, of the faculty of law of Lisbon, tries to summarize the various theories regarding this very complex problem. As he points out, this problem involves not only many branches of law but also political and economic considerations. The decision of the International Court of Justice in the *Barcelona Traction* case is quoted throughout the book, in most cases to back up the author's position.

In the first part of the book the question of nationality is studied from a private international law focus and the first issue raised is whether nationality can be attributed to companies. The opinions of Niboyet, Laurent and others who deny such a possibility are mentioned. The majority of authors, however, agree that companies possess a nationality and the cases support this view. The decision in *Barcelona Traction* is categorical. But agreement ends here, since doctrine and state practice adopt more than one criterion on this matter. The five principal theories are mentioned; the author believes that the incorporation theory carried the most weight in the *Barcelona Traction* Judgment.

In part 2, Marques dos Santos examines the question of diplomatic protection of companies and their shareholders. Regarding the efforts of various authors aimed at recognizing a right of diplomatic protection for shareholders of foreign corporations under general international law, he sees the 1970 decision of the International Court of Justice as reducing these efforts to regional applicability (p. 197). In other words, this decision spells out a tendency of the international community to transform international law into a veritable *universal* law, taking into account the various legal systems of the world besides those of Western Europe and the United States. However, it

should be pointed out that despite the expressed preference of some of the judges for the development of a rule permitting diplomatic protection of shareholders, they felt compelled to agree that Belgium lacked *jus standi* to afford such protection to those of its nationals who held shares in the Canadian company.

In the final part of the book, the author examines some exceptional economic measures that may be taken by states in case of war such as those against the property of enemy nationals and those aimed at the protection of the national economy during a war. The book also contains summaries in English, French and German, which give an idea of its contents.

In his conclusions, Marques dos Santos stresses that whatever the evolution of international law in this field, the nationality of companies will continue to be of paramount importance from a practical point of view. In the opinion of the reviewer, the author should have voiced his opinions more independently, developing them without so many quotations. We can only deplore that many specialists will not be able to surmount the language barrier, since this book is worth reading.

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Frustration of Contract und clausula rebus sic stantibus. By Stefan Schmiedlin.
Basel and Frankfurt am Main: Helbing & Lichtenhahn, 1985. Pp. 184.
Sw.F.48; DM 58.

Almost 30 years ago, I argued that application of well-settled rules of interpretation and supplementation of contracts required, in proper cases, not termination, but continuation in modified form, of a frustrated contract.¹ The argument was based on two simple propositions: first, that contractual terms should not be construed to cover situations that were not taken into account by the parties at the time of contracting;² and second, that appropriate terms should be supplied on the basis of good faith to regulate a situation that the parties did not intend to be covered by the agreed-upon terms of the contract.³ My analysis drew extensively upon solutions evolved in cases of frustrated contracts by courts in Western Europe. German and

¹ Smit, *Frustration of Contracts—A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287 (1958).

² Since words are merely symbols to reflect intentions, they should not be interpreted to cover the unintended. The doctrine of frustration is often said to be applicable when circumstances that were unforeseen at the time of contracting render performance unduly burdensome or expensive. However, since parties may take into account even circumstances they do not foresee, the proper criterion is whether the possibility of occurrence of even unforeseen circumstances was taken into account. *Id.* at 314.

³ Courts have consistently supplied terms to fill gaps left by the parties by creating "implied" conditions. See E. A. FARNSWORTH, CONTRACTS §9.6, at 677 (1982). It is rather astounding that they have been so reluctant to do so in frustration cases. The misconception that they would modify terms agreed upon by the parties is no doubt responsible. Smit, note 1 *supra*, at 288. See also text at note 16 *infra*.

Swiss courts especially have found no difficulties in supplying new terms for, rather than terminating, frustrated contracts.⁴

Since I first advanced my analysis, conditions in international commerce, in which frustration claims are perhaps made most frequently, have changed drastically. Foreign exchange rates have varied wildly,⁵ and so have prices of many basic commodities.⁶ It was therefore reasonable to expect increased reliance on excuses for nonperformance of the original contract terms such as frustration, unconscionability, mistake and creative construction of contract terms. Nevertheless, reported cases of successful reliance on such doctrines remain relatively rare.⁷ One of the reasons for this phenomenon may be that disputes of this nature arising in international commerce are increasingly resolved by arbitration and that arbitral awards are usually not reported.⁸

Although there appear to be no fully reported American or English cases in which a frustrated contract has been kept in effect under newly implied terms, scholarly attempts to justify this continue to be made.⁹ It may fairly be said that those that rely on the premise that, in a frustration case, the court may change the terms of the contract have been unable to find an acceptable legal basis for the exercise¹⁰ and that none of the others have found a more acceptable basis than the universally accepted ground rule of contract law that contracts must be performed in good faith.¹¹

In particular, currently fashionable analyses on the basis of an acceptable distribution of economic risks have contributed little to insightful analysis. The situations in which reliance may properly be based on the doctrine of frustration vary so widely that no generalizations appear possible as to those in which the economic risk can better be imposed on one party than on the other.¹² In the final analysis, it is not the party that can best bear the economic

⁴ Smit, note 1 *supra*, at 296, 298-99. The new terms need not necessarily favor the party that would suffer a loss in case of performance of the original terms. A party may also invoke frustration in order to obtain a reasonable part of the anticipated advantage that performance of the original terms would bestow upon the other party. See cases cited at 296 n.66, 298-99 nn.89-90.

⁵ For example, the U.S. dollar recently gained and lost more than 30% of its value within the space of 1 year.

⁶ The world market prices of oil, coal and uranium have both risen and fallen dramatically in recent years.

⁷ The most cited recent American case of successful reliance on frustration in a long-term contract is *Aluminum Co. of America v. Essex Group*, 499 F.Supp. 53 (W.D. Pa. 1980). For recent English cases, see Schmiedlin at 60 nn.257, 260.

⁸ Sometimes the newspapers or trade journals afford a glimpse of what is happening in the real world. See, e.g., *N.Y. Times*, Jan. 8, 1985, §D, at 2.

⁹ See, e.g., Speidel, *Equitable Reformation of Long-Term Contracts: The New Spirit of Alcoa*, 1982 UTAH L. REV. 985; Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 70 NW. U.L. REV. 369 (1981). For an excellent recent treatment of the whole subject, see Dawson, *Judicial Revision of Frustrated Contracts*, 64 B.U.L. REV. 1 (1984).

¹⁰ See Smit, note 1 *supra*, at 288.

¹¹ See *id.* at 313-15.

¹² Whether one party rather than the other is best situated to spread the economic burdens of the risk among the part of the public benefiting from its activities is a question to which the answer may vary from case to case. And if both parties serve a large constituency, both parties might be saddled with the risk.

risk, but the party that can fairly be saddled with the risk, on whom the law imposes its burden.

An effort could be made to distinguish between types of risks in applying the doctrine of frustration. It might be argued that the consequences of risks that affect a contract party personally and particularly should fall to the account of that party rather than to that of his contract partner. A typical example would be the burning down of the plant of a manufacturer who purchased raw materials for processing in that plant.¹³ In the other category would be unanticipated circumstances that represent market risks affecting all parties equally such as a generally unforeseen rise or fall in the market price of the product. Only the occurrence of such an event, it might be argued, would, in proper circumstances, justify equitable distribution of its consequences under the frustration doctrine.

Categorization of the risk along this line may be argued to serve a useful purpose because it may be helpful in determining whether it is reasonable to saddle a particular party with the consequences of the risk. However, in most cases of long-term sales contracts, the issue is likely to be devoid of practical significance because the purchaser will generally be able to sell the product on the market without suffering disastrous losses and will therefore not be in a position to rely on frustration in any event.¹⁴ But when this is not the case, there appears no good reason for saddling the party individually affected *a priori* with the risk. For when the unanticipated event was not taken into account by both parties, there appears no reason for imposing the consequences of its occurrence without further analysis upon the party individually affected. For example, if a purchaser of a raw material cannot use it because his plant has been demolished in a fire, it may be reasonable not to hold him to a purchase price that is significantly above the market price if the seller would make a reasonable profit even if the price were set at a lower figure.¹⁵

All in all, it may fairly be said that the theoretical premises upon which frustrated contracts are to be terminated or continued with new terms are satisfactorily established, but that the reported American and English cases have somewhat lagged behind in formulating an adequate basis for their decisions.

Dr. Schmiedlin's thesis therefore comes at an appropriate time. By providing detailed treatments of Swiss and English case law and doctrine, it furnishes most useful support for the view that common law courts should follow the example of their Swiss counterparts and, in appropriate cases, supply new terms for, rather than terminate, a frustrated contract. However,

¹³ It may be argued that the burning down of the plant is within the sphere of risks reasonably to be borne by the buyer. However, if the seller would continue to make a reasonable profit even if the contract were terminated or a lower purchase price were imposed, a good case can be made for saddling the seller with at least part of the consequences of the unanticipated occurrence.

¹⁴ Because it may generally fairly be assumed that the parties, had they taken the unanticipated event into account, would have left the risk of relatively minor fluctuations with the purchaser. See Smit, note 1 *supra*, at 307, 314.

¹⁵ See note 13 *supra*.

while Schmiedlin's thesis fairly restates the various theories advanced (pp. 27-36, 89-104; 121-49) and makes most useful classifications of cases in which frustration has been invoked (pp. 36-63), it neither endorses any of these theories nor develops its own analysis. For example, while noting that the English courts have thus far only terminated frustrated contracts and not provided new terms, it fails to argue that the theory of the implied term embraced by the English courts can provide a satisfactory basis for providing new terms as well as justify termination (pp. 65, 179-80, 182-83). The omission is the more remarkable since the Swiss courts, essentially proceeding on the same conceptual basis, have, in appropriate cases, provided new terms. Furthermore, the author continues to fall into the error of assuming that, in frustration cases, courts, when supplying new terms, modify the terms of the conduct agreed upon by the parties (pp. 182-83). This is regrettable, because the failure of common law courts to supply new terms in frustration cases is attributable in large part to their failure to discern that provision of new terms does not involve modifying the original terms of the contract.¹⁶

Notwithstanding the author's perhaps understandable reluctance at this early stage of his career to criticize leading writers and courts, this book is a most valuable addition to the literature and may provide further impetus to a comparatively inspired breakthrough in the common law doctrine of frustration.

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International Sale of Goods: Dubrovnik Lectures. Edited by Paul Volken and Petar Šarčević. New York, London, Rome: Oceana Publications, Inc., 1986. Pp. ix, 508. Index.

In the words of the editors of this useful volume, the United Nations Commission on International Trade Law (UNCITRAL) "has succeeded in giving new life to an old hope: world wide unification of the law of trade." This book is a significant addition to an outpouring of international literature centering on the United Nations Convention on Contracts for the International Sale of Goods, which, following a decade of preparatory work by UNCITRAL, was approved in 1980 without dissent by a diplomatic conference of 62 states.

The Convention is now being implemented by states in each of the regions of the world. In 1981, following recommendations by the American Bar Association and other leading organizations concerned with law and international trade, the President transmitted the Convention to the Senate with

¹⁶ A most interesting question, not addressed in the literature, is whether the provision of new terms would be the function of the judge or that of the jury. While it might be argued that the determination of what is fair and reasonable in the circumstances should be left to the jury, which, as in determining whether someone was negligent, would impose community standards, the better view would be to leave to the judge the provision of appropriate terms required by law.

the request for prompt consent to ratification.¹ On October 9, 1986, the Senate gave this consent by a vote of 98-0, and on December 11, 1986, the United States, Italy and China simultaneously deposited with the United Nations their instruments of ratification, bringing the number of formal approvals to 11. Approval (by ratification or accession) by 10 states is required to bring the Convention into force; following a 1-year period for education and other preparatory measures, the Convention will enter into force on January 1, 1988.² Constitutional measures for formal approval are at an advanced stage in several other states; this process will be accelerated by the Convention's entry into force.

The book under review is based on lectures delivered at a course on the International Sale of Goods that was held in 1985 at the Inter-University Center of Post-Graduate Studies at Dubrovnik, Yugoslavia. Ten lectures are devoted to the 1980 Convention on International Sales; four are concerned with related topics. The book provides an inviting tapestry that reflects the diverse interests of scholars from nine countries.

The opening chapter by Professor Sono (Hokkaido; Secretary of UNCITRAL, 1980-1985) recalls the foundations that leading continental scholars laid in the 1930s for the 1964 Hague Conventions on international sales; these Conventions entered into force among a small group of states primarily of Western Europe and will be superseded by the 1980 Convention. Sono also summarizes UNCITRAL's work in developing uniform rules for other aspects of international trade such as periods of limitation, arbitration and carriage of goods by sea.³

Dr. Volken (University of Fribourg) discusses the Sales Convention's scope of application and examines problems of uniformity of interpretation that can arise as the Convention is applied by domestic courts with diverse legal traditions.⁴

Professor Goldštajn (Zagreb) contributes a valuable exposition of the case for "autonomous" law for international trade—a concept with inviting vistas

¹ S. TREATY DOC. 9, 98th Cong., 1st Sess. (1983). The President's message attached a 3-page summary of the Convention by the Secretary of State and an 18-page legal analysis comparing the uniform sales law of the Convention with the sales article of the Uniform Commercial Code.

² As of December 12, 1986, instruments of acceptance—of ratification (R) by initial signatory states and of accession (A) by other states—had been deposited with the United Nations by the following 11 states: Argentina (A), China (R), Egypt (A), France (R), Hungary (R), Italy (R), Lesotho (R), the Syrian Arab Republic (A), the United States of America (R), Yugoslavia (R) and Zambia (A).

³ The scope of UNCITRAL's work was examined in a symposium of the *American Journal of Comparative Law: UNCITRAL's First Decade*, 27 AM. J. COMP. L. 201 (1979). The UN Convention on the Limitation Period in the International Sale of Goods (1974), closely related to the 1980 Sales Convention, is expected shortly to receive the requisite approvals for entry into force. The UN Convention on the Carriage of Goods by Sea (1978), in spite of opposition by carrier interests, is gradually moving towards entry into force. For material on this Convention and the UNCITRAL Arbitration Rules, see *id.* at 353-448 and 449-506.

⁴ The 12th International Congress of Comparative Law, held in Australia in August 1986, examined ways to promote uniformity in applying this and other Conventions, on the basis of 15 national reports and a general report prepared by this reviewer.

but ambiguous contours. Goldstajn also incisively examines the Convention's important provision (Article 9) that gives legal effect to usages, observed in international trade, that the parties have "expressly" or "impliedly made applicable to their contract"; these usages, like express contract terms (Article 6), take precedence over inconsistent provisions of the Convention and thus help the Convention to adapt to diverse and changing conditions. In the development of the Convention, states that are generally suspicious of usage as a source of public international law were able, albeit after extended discussion, to conclude that trade usage in the field of international commercial transactions could be given important legal effect without threatening their sovereignty.

Sono, in a second contribution, discusses the Convention's handling of problems that arise in the formation of contracts such as the revocation of offers and exchanges of communications that purport to close a contract when an offer and an "acceptance" do not perfectly match.

Professor Enderlein (Potsdam) contributes a thorough and valuable analysis of the obligations of the seller. Especially interesting are his comparisons of the Convention with rules of law under various legal and regulatory systems of the German Democratic Republic (GDR), including the General Conditions for Delivery for transactions between the socialist countries that are members of the Council for Mutual Economic Assistance (CMEA), and the GDR's 1976 Code on International Commercial Contracts (GIW) applicable to trade between the GDR and market areas.⁵ These comparisons reveal surprising similarity of result despite the differences between market and planned economies. Certain points of divergence are also interesting, such as the emphasis in planned economies on remedies to compel the delivery of substitute goods or the repair of defective goods.

Dr. Sevón (Ministry of Justice, Helsinki) contributes a careful study of the obligations of the buyer. Especially helpful is his examination of the Convention's remedies for breach, coupled with suggestions for contract provisions for problems that are too delicate to be left to general rules of law.

Professor Vilus (Novi Sad/Belgrade) reviews several important remedial provisions of the Convention—one party's privilege to suspend performance based on danger of failure of counterperformance, and impediments that prevent performance (*force majeure*).

Professor von Hoffmann (Trier) contributes an intensive and valuable study of the Convention's rules on when risk of loss shifts from the seller to the buyer, especially when goods are lost or damaged in transit. The analysis is illumined by examples from domestic legal systems, international trade

⁵ Czechoslovakia has a similar code, dating from 1963, which is designed for international transactions with parties in market economy areas. Of less relevance were comparisons between the international rules of the 1980 Sales Convention and the GDR Contract Act, governing relations between GDR socialist enterprises, and the GDR Civil Code, which primarily governs consumer sales.

usages, commercial practices and modern developments in international transportation. Especially interesting and challenging are points where von Hoffmann's conclusions differ sharply from those of the present reviewer.⁶

Professor Drobnič (Hamburg) draws on his background in comparative legal systems to address *General Principles of European Contract Law*, with special reference to the validity of contract provisions. This chapter demonstrates the need for uniformity in this field—and also the sharp diversity of approaches that makes unification difficult. The study wisely suggests that, in view of these difficulties, it will be necessary to examine and compare solutions for concrete problems rather than legal theories.

Professor Hellner (Stockholm) brings his widely recognized scholarship to bear on the relationship between the Sales Convention and various Standard Form Contracts—especially the ICC's Incoterms (1980) and the (ECE) General Conditions for the Supply of Plant and Machinery for Export (ECE 188). Particularly significant is Hellner's conclusion that the ECE General Conditions unduly restrict the buyer's right to avoid the contract for serious breach, and therefore need to be supplemented by the provisions of the Convention.⁷

The book closes with four papers that are not so closely related to the 1980 Sales Convention. Professor van Houtte (Louvain) analyzes the international sales price as a basis for customs valuations; Professor Conetti (Trieste) discusses conflicts rules applicable to international sales; Professor Hoyer (Vienna) examines problems related to security interests; and Professor Šarčević (Rijeka/Lausanne) gives detailed attention to the UNIDROIT Geneva Convention on Agency in the International Sale of Goods (Geneva, 1983).

This reviewer found much of value in this book and can recommend it for those who specialize in commercial, private-law problems of international trade. Finally, this review provides an occasion to note that, with the approaching entry into force of the 1980 Convention, the general commercial lawyer needs to have ready access to this uniform law for international sales. This calls for reexamination of 1950 legislation that excluded treaty law from the *Statutes at Large* and the *United States Code*. Informal, ad hoc arrangements have been made for the inclusion of the 1980 Sales Convention in the *United States Code Annotated* and similar unofficial publications, but there is urgent need for a system to assure that treaty law of general significance will be available in the average private-law library. But that, as Kipling would say, is another story.

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⁶ E.g.: damage during preliminary transport in the seller's own vehicles (p. 287). Contrast J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 U.N. CONVENTION* §368 (1982).

⁷ Points where Hellner differs with this reviewer's analysis of the Convention include notes 12 (c.i.f. terms and Incoterms) and 14 (delivery procedures provided by Article 31(b) when the contract relates to goods at a specific location).



Dreptul comerțului internațional (2d ed.) (The Law of International Commerce). By Tudor R. Popescu. Bucharest: Editura didactică și pedagogică, 1983. Pp. 576.

A new edition of the impressive handbook on the law of international commerce by Professor Tudor Popescu has recently been published. Popescu's long academic career and his many works, published in Romania and elsewhere, as well as his personal participation in the elaboration of new rules of international law, guarantee the high quality of this manual. In the foreword he explains the necessity for a new edition (the first appeared in 1976) "with a more accentuated practical character." That practical character should be emphasized. It is based on the vast literature in this field (particularly on that of France). It analyzes all of the problems belonging to the law of international commerce.

The manual is divided into four parts; these are followed by summaries in French and Russian, an index and an appendix providing a tabulation of arbitral practice.

The first part is entitled "Sources, Acts of Commerce, Participants in International Commerce." Here the author shows us that the subject matter of the law of international commerce has dual characteristics, being both commercial and international. The foreign element leads to the consequence that the legal relations involved are governed by private international law, although that does not always mean that the sale is itself international. We must emphasize that there are cases in which even the presence of a foreign element does not transform the relationship from one of internal law to one of private international law. The author criticizes the term "commercial international law," in spite of the existence of a United Nations Commission for International Trade Law.

The sources of international commercial law are shown to be both internal and international. In the former category are such special laws for foreign trade as the Czechoslovakian Law No. 101/1963, the Gesetz über internationale Wirtschaftsverträge of the German Democratic Republic and the Uniform Commercial Code of the United States, as well as general civil laws and practice. In the latter category are international rules such as the conventions concerning the unification of private law and international commercial practice.

Popescu accurately analyzes the various aspects of trade practice. He emphasizes the creative role of practice, the most characteristic being its use in the adaptation of contracts to avoid their nullification, and the role of custom in explaining standardized clauses. In the section devoted to the participants in international commerce, all sorts of commercial companies are fully examined. We have one critical remark to make; the author regards private arbitration as still in force in Romanian law (p. 127). True, it has not been abrogated, but it is no longer used.

The second part of the book deals with contracts of international commerce and the international sale of goods. In relation to choice-of-law clauses (*pacta de lege utenda*), the author writes:

This possibility given to the contracting parties to choose the applicable law is recognized by all systems of law, even if there are controversies about the limits of its application. Even the law of the United States, which in the first *Restatement of the Law of Conflicts of Laws* (1931) refused to allow the parties the right to choose the applicable law for the contract, in the *Restatement, Second* (1971) openly recognized this right for the parties.

In Popescu's opinion, foreign law is to be considered as an element of "law" and not as an element of "fact." We maintain our opinion¹ that foreign law is "fact" and not "law," because it must be proved and the rule that *jura novit curia* does not apply here. Even the author agrees that foreign law must be proved in the courts like any other "fact."

The interpretation of the choice of law made by the parties, the author shows, must be treated in accordance with the rule *potius est ut valeat quam ut pereat*. He also analyzes Incoterms, leasing contracts, know-how contracts and engineering contracts. In relation to the last, he writes, "the legal concept of engineering is a creation of American practice. . . . Like the Anglo-American concept of agency, the engineering contract contains a series of legal relations, which, in our law, belong to the realm of classical contracts, but which are connected by their unity of aim and object" (p. 282).

The third part of the manual is entitled "Elementary Notions of Banking Law in International Commerce" and the fourth part is dedicated to international commercial arbitration. The problems dealt with include the United Nations Convention on Arbitration, the jurisdiction of arbitrators, including the problem of their authority to judge their own jurisdiction, and the contents of the arbitral award and its execution.

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Droit et pratique des préférences généralisées. By Natan Elkin. Louvain-la-Neuve: Ciaco, 1985. Pp. 313. F.980.

By agreeing to the "Generalized System of Preferences" (the GSP), the contracting parties to GATT have authorized preferential tariff treatment for less-developed countries. The decision to allow these preferences derogates from the principle that states are to be treated as economic equals, a principle that follows from GATT's original adoption of most-favored-nation treatment for trade between contracting parties. Although early GATT documents recognized the special needs of less-developed countries, the origin of the GSP concept is often traced to the 1964 report to the United Nations by the Argentine economist, Dr. Raúl Prebisch. Acting on this report, the General Assembly established UNCTAD, which provides less-developed countries a forum to urge concessions, such as tariff preferences,

¹ Diamant, Book Review, 70 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 599, 602 (1981), and 72 *id.* at 198 (1983).

in order to encourage economic development. The developed countries have not rushed to make general concessions, but they have agreed, albeit grudgingly, to the principle of the GSP and individual countries have adopted specially tailored tariff concessions.

Dr. Natan Elkin, a compatriot of Dr. Prebisch, analyzes the adoption and implementation of the GSP in the book under review. The book's first chapter sketches the historical antecedents of GATT and the GSP, making the necessary point that special trading relations between nations antedate the widespread adoption of most-favored-nation treatment. A short second chapter sets out systematically the basic attributes of the GSP, while a longer third chapter analyzes the system's legal status. The next two chapters examine in substantial detail the implementation of the GSP by the more-developed countries, with special emphasis on the details of European regimes and the role of the GSP in the *Realpolitik* of international commercial politics. A very short sixth chapter speculates about the nature of the principles underlying the GSP and the system's relation to the concept of a *droit du développement*. The book's themes are then summarized in a five-page conclusion.

The last 60 pages of the book include a detailed bibliography and an annex that collects official documents. Elkin suggests (p. 16) that the texts reproduced in the first part of this annex—UN General Assembly resolutions, resolutions of UNCTAD conferences, decisions of the UNCTAD Council, a resolution of the UNCTAD Special Committee on Preferences and several decisions and declarations made within the context of GATT—constitute a veritable "code" governing the generalized system of preferences.

Many of the strengths and weaknesses of the book can be traced to its origin as a revision of Elkin's 1983 doctoral dissertation, which he defended before the Faculty of Law of the Catholic University of Louvain. The book's greatest strength is its comprehensive and systematic exposition of the international and national legal texts that make up the written sources of the GSP. Although there is a natural tendency to cite European (especially French-language) texts, Elkin does include some discussion of the U.S. system of preferences and he cites the plentiful Anglo-American literature on GATT and the GSP.¹ At the same time, Elkin rarely goes beyond the written primary and secondary sources to report on actual practice or on the economic impact of the GSP. As a result, he probably underestimates *de facto* advantages enjoyed by less-developed countries, advantages such as the willingness of their more-developed trading partners to overlook their technical violations and their use of traditional GATT exceptions like the balance-of-payment exceptions in Articles XII–XIV.² For the GATT specialist, in sum, the book is a competent analysis of known material.

¹ As Elkin notes (p. 13), the delay between completion of the dissertation and its publication in 1985 means that he does not fully incorporate other important commentaries on the GSP. See especially A. YUSUF, *LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES* (1982).

² See J. JACKSON & W. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 1140–41 (2d ed. 1986).

For the nonspecialist reader, the chapters analyzing the legal status of the GSP will be of most interest. In chapter 3 Elkin distinguishes (p. 64) the *légitimité* of the GSP from its *légalité*. By legitimacy he means the acceptance of new values not yet incorporated into the legal system, while by legality he refers to values incorporated into the legal system. After close examination of the texts he collects in the annex, Elkin concludes that, if these acts are looked at as a whole and as part of an evolving process, the GSP has achieved both legitimacy and legality. He comes to this conclusion even though he notes that many of these documents explicitly state that they do not impose an obligation on donor states, and even though he concedes that the legal rights of the less-developed countries are relative because donor countries may now distinguish among them according to their state of development and may withdraw preferences as countries develop. He also acknowledges that the *efficacité* of the GSP depends upon implementation in national law rather than enforcement as an international legal norm. Nevertheless, Elkin concludes (p. 116) that these rights are *legal* in the sense that they constitute a *droit mouvant* or *droit souple*.

Elkin returns to this analysis in his final chapter (pp. 242-45), where he examines whether the GSP should be classified as part of a distinct branch of law identified by others as the *droit du développement*.³ Here he qualifies his earlier conclusion by writing that the GSP appears (*semble*) to have acquired a *certain* legitimacy and a *certain* efficacy that may be the basis in the future of an obligation to grant tariff preferences. At present, however, Elkin reluctantly concludes that there is no *right* to the GSP.

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Labour Law and Industrial Relations: Building on Kahn-Freund. Edited by Lord Wedderburn of Charlton, Roy Lewis, and Jon Clark. New York: The Clarendon Press; Oxford University Press, 1983. Pp. vii, 250. Index. \$37.50.

British labor relations appear to be in a perpetual state of turmoil as the bitter miners' strike of 1985 showed. The miners' strike ended in fiasco and illustrated the major shortcomings of British labor relations: the Marxist orientation of a segment of the labor movement personified by Arthur Scargill; the inability of the "central" labor organization (the Trade Union Congress [TUC]) to exert its influence and thereby avoid ineffective labor tactics of constituent unions that harm the entire movement; the dichotomy between the union worker's aspirations and the objectives of the union leadership; and the absence of a comprehensive legal regime adequate to channel labor disputes and thereby avert the violence so prevalent in the miners' strike.

The present docility of British trade unions seems to support the idea

³ Elkin cites in particular the works of Professors Rigaux, Virally and Schachter.

that all is now well and that these problems have been solved. The history of British labor relations, however, dictates a more cautious view.

Labour Law and Industrial Relations: Building on Kahn-Freund is a compilation of essays written by the leading experts in British labor law and relations. The great value of this work lies in its critical analysis of the problems inherent in British labor relations.

To state that the labor relations of a country are a product of its history and culture and that these essential national characteristics must be taken into consideration in fashioning its labor law nowadays appears to be a simplistic truism. This truism was ignored by English academic lawyers until the influence of Otto Kahn-Freund began to be felt in the late 1940s. The tremendous influence of Kahn-Freund in bringing about this revolutionary change is not exaggerated by Lord Wedderburn's comment that "to ask whether this revolution would have taken the same course without the presence of Otto Kahn-Freund . . . is rather like asking whether the Russian revolution would have taken the same course without Lenin's arrival at the Finland station" (pp. 31-32).

The importance of Kahn-Freund's contribution to English legal scholarship, with his emphasis on a sociological approach refined by a comparative law perspective, is sufficiently great to justify a book summarizing the great comparativist's efforts. The intention of the editors was to go further and, as the title indicates, "build on Kahn-Freund" by using his methodology to analyze the state of British labor relations and law since his death in 1979.

Thus, the book begins with a translation of Kahn-Freund's preface to the German edition of his *Labour and the Law*, which compares British and West German labor law. This introductory chapter is followed by two chapters outlining the influence of Kahn-Freund on British labor relations, written by Professor Clegg and Lord Wedderburn. These are followed by a chapter analyzing the German writings of Kahn-Freund, which contain his most explicit attempts to develop a sociology of labor law (Clark) and one summarizing his methodology, and, in particular, his use of comparative analysis (Lewis).

German legal scholars such as Eugen Ehrlich transformed the study of law by attacking the positivist idea that law is created solely by the state. Kahn-Freund refined the analyses of the sociological juristic school and most importantly applied its teachings by analyzing in detail the institutions of Weimar Germany's labor law (the arbitration system, judicial decisions, works councils, collective bargaining). From his detailed analysis of the "living law," he was able to provide support for his thesis that state intervention in labor relations had perverted the ideals of the labor movement by making labor law subservient to a dictatorial civil service and a conservative judiciary.

In providing such examples and by recounting the influence that the Weimar experience had on Kahn-Freund's views, these latter two chapters provide insights of great value for a larger audience than specialists in British labor law. A sociological approach, as applied by Kahn-Freund, and a comparative perspective can elucidate problems and prevent the fashioning of inappropriate solutions.

The contributors to *Labour Law and Industrial Relations* do not exempt Kahn-Freund from his own principles; they show how he altered his views in the face of developments in British labor relations in the 1970s. Kahn-Freund's view of British labor relations was, not surprisingly, greatly influenced by his Weimar experiences.¹ He therefore continually paid homage to the "direct democracy" heritage of British labor relations, that is, the important role played by shop stewards and their accountability to the rank and file. He believed that this tradition prevented alienation and served as a bulwark against the growth of fascism in Britain, whereas the centralized prewar German trade union movement furnished little opposition to Hitler.

This contention is questionable. Britain, after all, had a centuries' old tradition of individual political liberty sadly lacking in Germany, and this difference, as well as the geopolitical, economic and social differences between the two countries, more probably explain why they took separate paths in the 1930s. In his later writings, Kahn-Freund's infatuation with "direct democracy" waned as he began to view this political asset as an economic liability that impeded the implementation of structural adjustments essential to the continued vitality of the British economy. In modifying his views, Kahn-Freund demonstrated the need to reexamine one's own premises constantly, and he thus remained true to his own methodology.

The book concludes with a chapter that attempts to apply Kahn-Freund's teachings to recent developments in British labor law. This chapter will certainly be of interest to the specialist. Nevertheless, its detailed analysis of the labor legislation enacted by the Conservatives will perhaps be less accessible to the general reader than the previous chapters.

Labor relations are everywhere in transition. The premises upon which labor relations have been based may no longer be valid. The contributors to *Labour Law and Industrial Relations: Building on Kahn-Freund* provide few precise answers to how labor law can respond to these changes. They do, however, admirably illustrate the need rigorously to apply the sociological and comparative methodologies used by Otto Kahn-Freund in testing possible solutions, and in so doing they provide a work that should be of interest to both labor relations specialists and comparative lawyers.

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Netherlands Yearbook of International Law. Vol. XVI, 1985. Published jointly with the *Netherlands International Law Review* and under the auspices of the T.M.C. Asser Instituut, The Hague. Dordrecht: Martinus Nijhoff Publishers, 1985. Pp. xvi, 633. Index. Dfl.117.50; \$47.

As in prior years, this useful volume contains articles, as well as an account of Dutch state practice, treaties, municipal legislation with international im-

¹ Kahn-Freund, who served as a judge on the Berlin Labor Tribunal, fled Nazi Germany in 1933.

pact, judicial decisions and current scholarly publications for the period covered.

The eight articles compose a symposium on state responsibility and liability for injurious consequences arising out of acts not prohibited by international law. The authors are M. B. Akehurst of the University of Keele, England; M. C. W. Pinto, Secretary General of the Iran-United States Claims Tribunal; G. Handl, of Wayne State University, Detroit; J. Combacau and D. Alland, of Paris University of Law; Bruno Simma, of Ludwig-Maximilians University, Munich; G. M. White, of the University of Manchester, England; L. F. E. Goldie, of Syracuse University College of Law; and S. P. Jagota, visiting professor at Dalhousie University.

This topic has been under consideration by the International Law Commission, and the texts prepared in connection with the Commission's work are annexed. The consensus seems to be that the term "responsibility" should be used to describe "secondary" remedies for wrongful acts that violate "primary" norms, while "liability" for the consequences of ultrahazardous but lawful acts flows directly from a "primary" norm. Professor Goldie, while distinguishing between "absolute" and "strict" liability, characterizes the injurious effects of risk knowingly undertaken for profit, to the damage of innocent third parties, as unjust enrichment by means of expropriation, imposing liability upon the actor.

Interesting policy statements of the Dutch Government deal with the legality under Dutch law of the deployment of U.S. missiles in the Netherlands (pp. 320-32; over a dozen articles on that subject are listed in the bibliographical section of the volume, pp. 570-71) and the U.S. military action in Grenada (p. 337). The Minister of Foreign Affairs stated in Parliament on April 12, 1984, with reference to the attempt by the United States to forestall the filing of suit by Nicaragua, that "the American step [was] so disappointing" because "we used to regard the United States as one of the strong champions for increasing the jurisdiction and prestige of the International Court of Justice" (p. 396). The Minister of Finance likewise expressed disapproval of the system of "unitary taxation" of multinational or multistate corporate enterprise (p. 420) embodied in legislation such as that of California, which was approved in *Container Corp. v. Franchise Tax Board*.¹ It is noteworthy also that the rule against extraditing Dutch nationals now recognizes an exception if an arrangement is in force permitting any prison sentence imposed to be served in the Netherlands, after trial in the *forum loci delicti* (p. 346).

Under new legislation in 1984 on nationality, marriage has ceased to be a ground for automatic acquisition of Netherlands nationality, but the normal 5-year residence requirement has been eliminated in the case of a spouse if the marriage is of at least 3 years' duration. Likewise, "in line with prevailing ideas on marital bonds in the Netherlands," the residence requirement has been lowered to 3 years for unmarried persons "who have had an extra-marital durable relationship of at least three years with a Netherlands na-

¹ 463 U.S. 159 (1983).

tional" (p. 453). No loss of Netherlands nationality for any reason shall occur if such loss would result in statelessness (p. 454).

A number of interesting cases are found under the rubric of judicial decisions. The Supreme Court (Hooge Raad) rejected the claim of a Belgian Communist "draft-dodger" that his refusal to obey military orders was an unextraditable "political offense" because he intended to harm the Belgian armed forces, to which he objected, as to the Belgian state, because of their "capitalist" nature. The Court held that his individual action did not bring his political goals any nearer to fulfillment and that his action cannot be regarded as a political offense (p. 487). An administrative decision held that discharge of gypsum wastes into the western Scheldt River was not a discharge "at sea" and hence did not violate the Oslo and London Conventions of 1972 against such pollution; and since the discharge was "from ships," it was not prohibited by the Paris Convention of 1974 for prevention of "marine pollution from land-based sources" (pp. 519-20).

In another case, an industrial tribunal upheld the refusal of a license to export four submarines to Taiwan. Under applicable legislation, export could be prohibited by decree if required in the interest of the national economy, security or "the international legal order." It was admitted that issuance of the license would be likely to result in a "serious and prolonged disturbance" of relations with Communist China. In the absence of legislative history, and in the presence of conflicting views advanced by academic experts as to the meaning of "the interest of the international legal order," the tribunal found an analogy in the legislative history of Article 90 of the Dutch Constitution, which provides that "[t]he Government shall promote the development of the international legal order." The documentation there showed that the drafters of the Constitution held the view that "pursuit of good relations with other states must be regarded as promoting the interest of the international legal order." The drafters of the Import and Export Act could hardly have entertained a different view; indeed, as Professor Riphagen had observed, in the absence of a central international organization effectively exercising legislative, executive and judicial functions, good international relations constitute the essence of the international legal order. The tribunal also noted that the Government had indicated, when granting a license for the export of two submarines to Taiwan in 1980, that no further such licenses would be granted; that China had then reduced the rank of its envoy to the Netherlands to the lowest possible level, that of *chargé d'affaires*; that if a license were granted now, China might break off diplomatic relations altogether; that other exporters, including the United States, were reducing arms exports to Taiwan; that as a large and populous power, China was of essential importance to Asian stability; and that in light of all these circumstances the interests of the international legal order outweighed the loss of one or two thousand shipyard jobs. The 1980 decision is not a precedent requiring the grant of a license in 1983 because the factors involved were different (pp. 530-35).

EDWARD DUMBAULD
U.S. Senior District Judge

Soviet Year-Book of International Law, 1984. Moscow: Publishing House "Nauka," 1986. Pp. 384. 4 rubles, 90 kopecks; \$12.50.

The law of the sea provides a focus for the 27th volume in the *Soviet Year-Book* series. Authors show concern for far more than the 1982 Convention. Clearly, the USSR's status as a great naval and maritime power has influenced thinking, so that the major concern is no longer protection of coasts from invasion. Today, papers discuss the appropriate boundaries of areas of the sea; whether the "common heritage" concept is analogous to the traditional "freedom of the seas"; what general principles should guide draftsmen of agreements on rescue and salvage; whether a code on international inspection of fishing vessels is desirable in order to reduce the friction increasingly evident in practice; whether ecological protection of the sea is compatible with developmental goals; how unhampered access to the sea for research purposes can be provided in law without interfering in the internal affairs of states; and whether navigational rights of research vessels should be classified similarly to those of warships. Although a recurring theme is the long-favored one of protection of sovereignty, a new flexibility is evident.

The volume opens, as has become customary, with a paper by G. I. Tunkin, writing in his 80th year, but still President of the Soviet Association of International Law. His theme is to assess the Nuremberg principles 40 years after, but he goes back to 1917 to repeat his oft-told chronicle of Soviet contributions to the creation of a vastly developed general international law. He rejects Western authors who think that Nuremberg made individuals subjects of international law. He holds to the ever-repeated Soviet position that only states can be subjects. He reasserts his position that contemporary international law can be explained as the concurrence of wills of states rather than as emerging from endless struggle between competing systems. He finds law not only in treaties but in resolutions of the UN General Assembly, and regrets that the Assembly has not spoken out boldly against what he sees as the illegal actions of the "imperialists," headed by the United States and Israel. He sees these powers pushing international law back into what it was before the socialist camp emerged and negating achievements that have been recorded under the live-and-let-live principles that he and his colleagues have long called the "law of peaceful coexistence." As always, Professor Tunkin hits hard at what he calls the "nihilists" of the West.

The volume publishes, as usual, the minutes of the 27th (1984) annual meeting of the Soviet Society. It is here, as always, that the outsider finds hints of the dynamics of the formulation of Soviet positions on a variety of topics, for there is considerable divergence of views, especially on the public law panels. Speakers debate the status of a treaty obligation for signatories that do not ratify, and also the binding effect to be accorded custom when a third-party state has not adhered to a multilateral convention. The prevailing view seems to be that the third party is bound only if the principle enshrined in the convention has become *jus cogens*. Newly emerging states are thought by some speakers to be bound by a generally recognized norm, while others would bind the new state only if it had not objected to application

of the norm. Debate took place between O. V. Bogdanov and I. P. Blishchenko over the sources of disarmament law, whether in treaty or in general international law.

In the bibliography of works from the People's Democracies of Eastern Europe, the German Democratic Republic's authors prove to be the most prolific, but none even comes near to the mass of literature being published in the USSR itself, as evidenced by the 16 pages of items. Tunkin can take credit for stimulating the writing of an ever-increasing number of papers and books, for bringing the Soviet Association into the worldwide International Law Association and for publishing the *Year-Book*. His 80th birthday is an occasion that commands attention the world around, even among the many with whom he crosses swords.

JOHN N. HAZARD
Board of Editors

Die amerikanische Politik gegenüber dem südlichen Afrika. By Martin Schümer.

Published under the auspices of the Forschungsinstitut der Deutschen Gesellschaft für Auswärtige Politik. Bonn: Europa Union Verlag, 1986. Pp. v, 183. DM 12.

Since its assumption of office in 1981, the Reagan administration has followed a policy of constructive engagement with regard to South Africa. Its aim is to maintain cordial relations with the white minority regime in order to generate influence that could be used to persuade it to adopt internal reforms and external policies conducive to peace in the southern part of the African continent. The book under review is an examination of how this approach has been handled in practice and what results it has produced.

The first three chapters deal with the Angola-Namibia complex, Mozambique and Zimbabwe. On the first issue, the United States and South Africa agree that Namibian independence should be linked to the withdrawal of Cuban troops currently stationed in Angola. But, whereas the United States would be content with improving relations with the current Marxist Government of Angola in order to woo it away from Soviet influence, South Africa seeks its downfall and replacement with a more friendly government led by the UNITA¹ rebels. Although it concluded a peace agreement with Angola in February 1984, South Africa has continued to provide assistance to UNITA and periodically to invade the southern provinces of Angola under the pretext of destroying bases of the Namibian guerrillas of SWAPO.² As a result, Angola has sought more support from its Soviet and Cuban allies and the size of the Cuban expeditionary force has increased. This evolution has been accentuated by the repeal of the Clark amendment by the U.S. Congress, which forbade military assistance to UNITA. As for Namibia, hopes for an independence settlement in accordance with the rel-

¹ Movement for the Total Independence of Angola, led by Jonas Savimbi.

² South West Africa People's Organization, led by Sam Nujoma.

evant UN guidelines³ have become very dim indeed, although South Africa has been prevented so far from granting the territory "independence" on its own terms.

South Africa also concluded a peace agreement with Mozambique at Nkomati in 1984, while U.S. diplomats were busy improving relations with the Machel Government. However, South Africa has never stopped assisting the RNM⁴ rebels and thus contributing to the further deterioration of the internal situation in Mozambique. As for Zimbabwe, the U.S. attitude has wavered between approval of the country's pragmatic policies and upset over its Marxist rhetoric. The latter concern led to a near break in diplomatic relations in July of last year.⁵

The remaining four chapters deal mainly with South Africa itself. The first (ch. 4) describes the genesis and development of the sanctions campaign in the United States and its impact on Congress. It is followed by a description of the attitude of U.S. economic circles toward sanctions and the tendency of U.S. corporations to leave South Africa mainly for reasons of lack of profitability and excessive risk. The next chapter considers events leading to the presidential sanctions decree of September 1985, which was designed to forestall tougher legislation contemplated by Congress. The last chapter describes the evolution of the U.S. attitude toward the ANC,⁶ partly under the influence of contacts with that organization initiated by influential South African businessmen. The author's overall verdict is that the constructive engagement approach has been a total failure and that such successes as its proponents claim for it are actually due to pressures in South Africa itself and the impact of the growing sanctions movement in the United States and worldwide.

For anyone who desires an up-to-date presentation of the evolution of U.S. policy in southern Africa, this well-written and objective study is of great usefulness, particularly with regard to economic questions and the attitude of business both in the U.S. itself and South Africa. It shows that within the global East-West perspective favored by the Reagan administration, good relations with the current regimes of Angola and Mozambique, the acceptance of Namibian independence under a SWAPO government and early steps toward ensuring good relations with a postapartheid South Africa are more likely to benefit U.S. and Western interests than stubborn adherence to ineffective constructive engagement policies. Some comparisons are drawn with the situation in the Middle East, and the author finds that in southern Africa the United States has successfully avoided—so far—the

³ SC Res. 435 (Sept. 29, 1978), which established the UN Transition Assistance Group for Namibia.

⁴ Mozambican National Resistance. This movement appears to lack strong central leadership and has no clear policy beyond the overthrow of the current Government.

⁵ As a result of the speech made by a cabinet minister at the July 4 reception in the presence of former President Carter, the U.S. ambassador was recalled. *See* *ECONOMIST*, July 19–25, 1986, at 35. Economic assistance was later canceled.

⁶ The African National Congress, a multiracial movement whose titular leader is the imprisoned Nelson Mandela and whose acting leader is Oliver Tambo.

trap of becoming too closely identified with one side while seeking to play the role of an honest broker.

The book deals with events up to October 1985. Developments since that time appear to confirm most of the author's findings. The South African Government has continued to disregard outside pressures and has toughened its attitude by imposing a general state of emergency in June 1986 and pursuing military incursions into neighboring countries.⁷ These actions have not led to any lessening of pressures from the black majority inside South Africa and have given more fuel to the worldwide sanctions campaign. The South African economy is in deep recession and is preparing for a siege. Its leaders must now pay at least lip service to the Government's defiant position. It will be interesting to know whether and how they will pursue their contacts with black movements in order to promote a reasonably stable and prosperous postapartheid South Africa.

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Tratado concerniente a la neutralidad permanente y al funcionamiento del Canal de Panamá. By Julio E. Linares. San José: Litografía e imprenta LIL, S.A., 1983. Pp. 316.

The still recent Panamanian-American Treaties concerning the Panama Canal have given rise to an interesting bibliography, proof of which is offered by the invaluable monograph published in Switzerland by Dr. Richard Perruchoud.¹ The book that is the subject of this review came out in the same year—1983—as the aforementioned publication. It is the work of the prestigious Panamanian jurist Dr. Julio E. Linares, a former minister and a professor of international law in his native country. He approaches the question from the point of view of the legitimate interests of Panama. As the subtitle of the work so expressively suggests ("From Roosevelt colonialism to senatorial neocolonialism"), Linares's entire dialectical effort is devoted to demonstrating with sound arguments how the gains achieved by Panama in the new Canal Treaty were tempered in the Treaty concerning the neutrality of the Canal by the amendments, conditions, reservations and understandings or interpretations introduced by the U.S. Senate when it gave its advice and consent to the ratification of the Treaty. The author underlines the fact that this Treaty is to govern in perpetuity not only the present sluice Canal, but also, with regard to the regime of permanent neutrality, any other international waterway constructed either entirely or partially on Panamanian soil and, with regard to the internal security, efficiency and maintenance of the Canal, any other interoceanic route that might be used, totally or partially, within such territory, provided that the United States has participated or is at present participating in its construction or financing.

⁷ See *ECONOMIST*, June 21–27, 1986, at 45–46.

¹ R. PERRUCHOU, *LE RÉGIME DE NEUTRALITÉ DU CANAL DE PANAMA* (1983).

In successive chapters, the author studies the signing of the Torrijos-Carter Treaties, the doubtful capacity of Torrijos to represent Panama in their signing and ratification, the Panama Canal Treaty and the 1967 projects for the Treaty, the question of permanent neutralization or neutrality, the position relative to this before the 1967 Treaty and the protection and defense of the Canal according to the Treaty. The detailed analysis and critical review of the text of the Treaty are very interesting (with the inclusion of a long historical paragraph with reference to Article VI, covering both the Thompson-Urrutia and the Montería Treaties). There are pertinent observations regarding the absence in the Treaty of a clause stipulating compulsory arbitration or one that recognizes the compulsory jurisdiction of the International Court of Justice, and Linares duly emphasizes the danger this implies for Panamanian interests. In the following chapters, the passage of the Treaties in both countries is described and the aforementioned senatorial amendments, conditions, reservations and interpretations are examined and criticized with great rigor and care. There is also a transcription and discussion of the letter Carter wrote to Torrijos when the Senate gave its advice and consent to the ratification of the Treaty. In this letter Carter guarantees that he will respect the sovereignty and dignity of Panama and reaffirms the principle of nonintervention in its internal affairs. However, the letter is received with skepticism by Linares who doubts whether the statements contained therein will be honored in view of similar promises made at other times to Panama by Presidents Theodore Roosevelt and Taft, which were openly broken later on. At the same time, the Panamanian Instrument of Ratification is examined in detail concerning the Treaty of Neutrality and Panama's relations with third countries. On this point, Linares is of the opinion that agreement to the Protocol to the latter Treaty does not confer any rights on the states adhering thereto with respect to transit through the Canal; nor does it permit them to take any action whatsoever to maintain the regime of permanent neutrality. The book ends with a chapter devoted to the nullity of the Treaty of Neutrality and to the legal position of Panama as to rescinding it, together with some conclusions. With respect to invoking nullity, the author concludes that the Treaty cannot effectively grant the United States a hypothetical "right" of aggression and that it prevents Panama from freely disposing of its most important natural resource. In the conclusions, the thesis supported throughout the book is briefly reiterated. There is also a useful documentary appendix and a well-chosen bibliography.

In short, this work is to be recommended. It is essential reading for all those who are interested in this subject.

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Crisi Falkland-Malvinas e organizzazione internazionale. Edited by Laura Forlati and Francisco Leita. Padua: CEDAM, 1985. Pp. x, 224. L. 17.000.

Let us imagine we are dreaming. . . . Let us imagine we will wake and all this will belong to the past. I will then call you up and say "I had

this curious dream, so absurd, a war with England, just imagine. . . .”
And you will wait a while and say “Borges, do you know, I had that
very same dream myself.”¹

For those who have been close to the problem, it is difficult to write about the Malvinas war without reliving the traumatic experience of those dark days of 1982. Yet almost 5 years have now elapsed and it is time to reflect on the event in serenity. In doing so, I wish to put into brackets the merits of the territorial dispute. I would like to focus instead on a far more difficult legal, political and moral puzzle: Why did the war take place? What *kind* of war was this and what does it teach us? We must not forget that these are not, and should not be, just academic questions; as Michael Walzer has reminded us, war has a moral reality.²

By June of 1982, the Argentines had reached a level of political and moral depression rarely paralleled in history. Yet from these ashes the Argentines started to understand the value of human dignity, respect for human rights and the importance of peace. We are familiar with the fortunate outcome: Argentina has now become, after its darkest era, a liberal democracy, once again respected in the family of nations. Nationalistic rhetoric aside, the moral force of those achievements far exceeds any benefit that might have accrued to Argentina from recovering the islands.

There are several conventional explanations of the Malvinas war. The first was put forth by the Argentine Government at the time. The military took the islands by force because the Argentine people were tired of the protracted, useless negotiations with the British and of the insensitivity showed by them toward the legitimate Argentine aspirations.³ Of course, it does not follow from the undeniable truth that the British never took the negotiations seriously⁴ that the Galtieri junta acted wisely or lawfully in undertaking that costly military adventure. In other words, in international law as in common sense, reluctance to negotiate cannot justify violence.

Another possible explanation is that the Malvinas conflict was part of a broader confrontation in the South Atlantic, which would encompass the conflicting claims over Antarctica as well. This view, which is popular in some Argentine circles and is suggested by one of the essays in the book under review,⁵ would have it that the Anglo-Argentine confrontation is best

¹ Jorge Luis Borges, in a conversation reported in *BLACK WATER. THE BOOK OF FANTASTIC LITERATURE* 345 (A. Manguel ed. 1983).

² M. WALZER, *JUST AND UNJUST WARS* 3–20 (1977).

³ See Declaration of the Argentine Foreign Minister in the Security Council, UN Doc. S/PV.2350 (1982), reprinted in R. PERL, *THE FALKLAND ISLANDS DISPUTE IN INTERNATIONAL LAW AND POLITICS* 432, 437 (1983).

⁴ A personal experience will suffice to illustrate this. When the present writer was a member of the Argentine delegation that met with the British in Lima, Peru, in February 1978, to discuss the Malvinas controversy, the British delegates first listened politely to our proposals (which included a broad scheme of economic cooperation designed to bribe them into recognizing Argentine sovereignty). As soon as we had finished, they retrieved brochures displaying the most recent models manufactured by their ship industry and started explaining the reasons why the Argentine Government should buy them.

⁵ See Battaglini at 2, 6–10.

understood from the standpoint of "geopolitics." This explanation is not convincing. There is no such thing as a science of "geopolitics" that would explain conflicts by reference to the "great picture" or the "logic of the situation" or the "true national interests" involved. Wars are unchained by the choices of men and women. Those decisions are influenced by many heterogeneous factors: pure vanity and other psychological obsessions of decision makers, domestic political pressures, perception of a mythical "national interest," ideological considerations, and so on. It is therefore impossible to reduce a phenomenon like the Malvinas war to geopolitical variables, even assuming that such variables would make sense.

The more common explanation, however, was articulated by the press and many observers at the time. The Argentine junta attacked in order to divert attention from domestic political and economic problems. This explanation has considerable merit. Governments, especially tyrannical ones, often turn to foreign policy in the hope that the people will forget about their domestic plight. This was particularly true in Argentina in 1982, where the Government's domestic policies were no longer a viable option for political or economic success. Yet this is only part of the story. Why take that tremendous risk? And, in any event, for how long could a government divert attention from domestic problems?

I would like to suggest here another explanation, one which, in conjunction with the last one mentioned, may help clarify why the Argentine dictators did what they did. There is a strong correlation between domestic oppression and foreign aggression.⁶ Those rulers who ignore moral and legal constraints in the way they treat their citizens are likely to ignore similar constraints in their dealings with other nations. There are two reasons for this. First, the lack of democratic checks to power eliminates the debate that may give government officials a sense of whether it is right or wise to engage in a foreign conflict. To be sure, democratic debate will not necessarily prevent foreign policy mistakes, as the American Vietnam experience painfully shows. But at least it will enrich the decision makers' perspective and awareness of the dangers involved, and will thus diminish the risk of tragic foreign policy errors.⁷ Second, dictators inevitably become persuaded that they can get away with anything. For those who regard themselves as being above the law, international law is no exception. Because they encounter no domestic opposition, their sense of power grows to egomaniacal levels, and soon they start believing that they can bully anyone who happens to be in their way, including foreign governments. The stage is set for the implementation of

⁶ See the revealing study by Doyle, *Kant, Liberal Legacies and Foreign Affairs*, 12 PHIL. & PUBLIC AFF. (pt. I) 205, and (pt. II) 323 (1982), which argues that wars have never taken place among liberal states.

⁷ Aside from the legal or moral correctness of their action, the prudential miscalculations of the junta's members were truly incredible. Not only did they reject proposals that were much more advantageous to them than anything they could have got by negotiation (see Coll, *Lessons for the Future*, in THE FALKLANDS WAR 232-38 (A. Coll & A. C. Arend eds. 1985)), but, in their madness, they also believed that (1) the United States would be neutral; (2) the Soviet Union would veto anti-Argentine resolutions in the Security Council; and (3) the British would not react.

the "might makes right" philosophy. This point is illustrated by the junta's attitude toward the two superpowers. During the late 1970s, the public enemy of the Argentine military was President Jimmy Carter. The dictators reacted angrily toward what they then perceived as the "stupid idealism" reflected in his human rights policy. Notwithstanding their furious anti-Communist creed, they admired instead Soviet "realism," as shown, for example, by the invasion of Afghanistan. They thought that the Soviet Union was an example of a nation that knew what it wanted and took it, and got away with it because, unlike the United States, it was not constrained by moral principles. In short, the Argentine dictators subscribed to the theory of the amorality of international relations. So the issue for them was not whether it was lawful, right or even wise to invade the islands. The only issue was whether they could get away with it. The same Hitlerism they practiced within Argentine borders became their guide in international relations.

The foregoing considerations show why it would be wrong to believe that the Malvinas adventure is independent from human rights concerns. The two issues are linked in two important ways. As indicated above, the tyrant's domestic immorality carries over to foreign affairs. But equally important, apart from self-defense, wars waged by *dictators* who force men and women to fight and eventually die are immoral, unjust wars because the dictators do not represent the people. This was true in the South Atlantic even if, as a matter of international law, the islands should belong to Argentina. The junta, a self-appointed group of tyrannical rulers, took all of Argentina into an enterprise that could not be morally justified precisely because of their tyrannical nature. This is so, totally apart from the illegality of the adventure and the high probability that it would result, as it did, in a military disaster.

These moral considerations were not absent from the world's reaction. After a resounding diplomatic defeat in the United Nations, the Argentine junta could get no more than a verbal condemnation of the United Kingdom in the OAS. The perception of the international community was that the junta's action was unlawful and that a fascist government did not deserve support, regardless of the merits of the controversy. Even those governments, like Venezuela and Panama, which expressed solidarity with Argentina, failed to endorse the military invasion. In short, in this human rights era, world opinion is increasingly focusing not just on the reasons for wars, but on the moral legitimacy of those governments that initiate them.

In the volume under review, several scholars, most of them Italian, examine legal aspects of the world's reaction.⁸ The essays focus on two main topics. The first is the legality of the Argentine invasion and the British

⁸ The post-1982 literature on the Malvinas is voluminous. See the books by R. PERL, *supra* note 3, and Coll and Arend (eds.), *supra* note 7; and LA QUESTIONE DELLE FALKLAND-MALVINAS NEL DIRITTO INTERNAZIONALE (N. Ronzitti ed. 1984). There is also a periodical literature that is extensive in this *Journal* alone. See Acevedo, *The U.S. Measures Against Argentina Resulting from the Malvinas Conflict*, 78 AJIL 323 (1984); Franck, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, 77 *id.* at 109 (1983); and Moore, *The Inter-American System Snarls in Falklands War*, 76 *id.* at 830 (1982). For a serene Argentine account, see R. VINUESA, *EL CONFLICTO POR LAS ISLAS MALVINAS Y EL DERECHO INTERNACIONAL* (1982).

response. The second is the reaction of international organizations, in particular the EEC and the OAS. As to the first, the conclusions of the authors differ. Professor Joe Verhoeven, for example, concludes that the action by the United Kingdom cannot be characterized as self-defense because the Argentine attack was not technically aggression. Verhoeven supports this statement by observing that the British title to the islands was precarious, and that therefore the Argentine attack cannot be said to have been against British sovereignty. Thus, under Resolution 3314 (XXIX), the precariousness of the British title is a "pertinent circumstance" excluding aggression. He nevertheless believes that the Argentine invasion was unlawful, a violation of Article 2(4). Since it was not aggression, however, the United Kingdom could not claim to be acting in self-defense, but could invoke instead the justification of armed reprisals, whose legality the distinguished Belgian professor defends (p. 101). This original analysis is particularly topical in view of the recent U.S. raid on Libya (best explained as an armed reprisal, rather than self-defense); and also in the light of the recent ICJ discussion of self-defense and countermeasures in the *Nicaragua* case. Armed reprisals are punitive in character, however, and the British action was instead aimed at regaining control over the islands.

Professor L. Forlati also takes the view that the British action cannot be characterized as self-defense, but for a different reason: that the UN Charter only authorizes reaction in self-defense against an *ongoing* armed attack (pp. 137-40). Since the Argentine invasion had already been consummated, the delayed British reaction could not be justified under Article 51 of the Charter. Forlati believes that the British action could be justified instead under customary law principles of self-help (p. 139). She also discusses, and correctly rejects, the claim that the British action could be characterized as having been in defense of human rights (pp. 144-45). While Forlati's view of the interplay between Articles 2(4) and 51 is too restrictive, her analysis is original and well documented. In a short essay, Professor B. Grandi argues that since Argentina failed to withdraw the troops as provided for in Resolution 502, the United Kingdom's action was a lawful exercise of the right of self-defense. He reserves his opinion, however, about the proportionality and necessity requirements (pp. 44-45).

As to the second theme (the reaction of regional organizations), the analyses are equally divergent. Professor M. Panebianco presents a thorough account of the actions of the EEC and the OAS. He aptly observes that Latin American solidarity did not result in assistance to the Argentine armed aggression, but rather in solidarity with Argentina for the economic damage suffered from the European sanctions (p. 82). However, the question which of these partly contradictory reactions was more consistent with international law, and especially with Resolution 502 of the Security Council, remains unanswered. In a subtle article, Verhoeven concludes that the EEC did not have the express or implied power to adopt punitive measures against third parties for the violation of rights of a member state, as opposed to the violation of the rights belonging to the EEC itself (pp. 101-15). Only the individual states are empowered to do so. A similar view is defended by Professor F. Pocar in his penetrating short piece. He demonstrates that the

sanctions could not possibly have been based on Articles 113 and 224 of the EEC Treaty (pp. 159–62). A different view about the EEC sanctions is defended by Forlati, who argues that while the sanctions were legitimate in regard to the member states and Argentina, they were not so with regard to the dissenting members, Italy and Denmark (pp. 147–56).

Two articles discuss the application of the Rio Treaty. Professor Cançado Trindade offers a fascinating account of the process of adoption of the two resolutions by the 20th Meeting of Consultation of the Rio Treaty (pp. 163–94).⁹ After delineating the difference between the moderate first resolution (before the British landing) and the more aggressive second resolution (after the British landing), he observes that even those countries that supported Argentina did so reluctantly (with the possible exception of Venezuela). He concludes that the American nations as a whole refused to adopt the Malvinas cause as an inter-American cause (p. 201). In his final paragraph, Cançado Trindade hints at the possible reasons for the failure of the Rio Treaty: the reluctance of most American nations to express solidarity with a government guilty of gross violations of human rights. In an essay on the same issue, Professor Leita aptly shows that, in the presence of an armed attack in the sense of the Treaty, the member states regarded themselves bound only by the duty of mutual consultation, thus leaving all measures in aid of the Argentine junta to their total discretion (pp. 216–20). In the opening essay, Professor Battaglini offers an interesting historical survey of the dispute, although he exaggerates the importance of the “Antarctic connection” (see pp. 6–10). Particularly illuminating are the discussions of the 17th-century views of Dr. Samuel Johnson (pp. 1–5, 11–12). Finally, Professor Migliazza recalls the applicability of the law governing military occupation, principles that the Argentine army honored (perhaps its sole redeeming feature) even though it regarded the islands as Argentine territory (pp. 27–30).

The volume under review is a high-quality contribution to the already important existing literature about the Malvinas war. It is most valuable for anyone interested in the legal aspects of the conflict. Not the least of its merits is the consistency in the quality of the essays, which shows the increasing influence of Italian writers upon international legal thought.

What matters most today is to assess the political future of the dispute. Democratic Argentina has expressed its intention to settle the conflict peacefully, but understandably has not renounced its intention to recover the islands. The United Kingdom must be sensitive to the importance of the political changes inside Argentina, and make every effort to reach a solution, now more than ever.¹⁰ Fresh, meaningful negotiations are therefore indicated. Yet if these fail again, the wisest move would be adjudication by a judicial or arbitral body. Unlike many of my fellow citizens, I happen to believe that Argentina has a very strong legal case and should agree to submit the dispute to an impartial judicial or arbitral body for resolution.

⁹ For an American perspective, see Moore, *supra* note 8; see also Perera, *The OAS and the Inter-American System: History, Law, and Diplomacy*, in Coll & Arend (eds.), *supra* note 7, at 132.

¹⁰ Unfortunately, the recent British declaration of a 200-mile fishing zone around the islands is most unhelpful in this regard.

Be that as it may, the paradox is that Borges's nightmare of 1982 has generated, for the first time in Argentina, hopes that there will be no more crimes committed by despotic rulers, both within and outside Argentine borders.

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La Reestructuración del Sistema Interamericano (Carta de la OEA-TIAR). By Jorge Guillermo Llosa. Lima: Ministerio de Relaciones Exteriores, 1982. Pp. 148.

The conflict between Argentina and Great Britain in 1982, known as "the Malvinas War," and its inevitable diplomatic consequences, forces the members of the Organization of American States to analyze and debate the principles and objectives of the system in which they operate. With this aim, the Special Commission for the Study and Restructuring of the Inter-American System was created within the regional organization. This book provides a record of the contributions to the commission by Jorge Guillermo Llosa, as the Peruvian representative, and it includes the text of the lecture he gave when he was named as a member of the Sociedad Bolivariana del Perú.

If the book is analyzed from a purely formal point of view, one must conclude that it is somewhat anarchic and difficult to read. The portion dealing with the commission consists of a partial transcript of the commission's sessions, edited to present, as a soliloquy, Llosa's contributions to what was undoubtedly an interesting discussion. The objective of the book—to make public the position of Peru on the subject debated—could also have been attained by publishing the proposal that was prepared by the Peruvian delegation and submitted to the Special Commission for its consideration. To make such observations, however, is in no way to impugn Llosa's knowledge and authority as a presenter of Peru's position, or to deny the relevance of the points that he raises.

The Peruvian proposals would amend Articles 1, 2, 3, 16, 18, 19, 21, 23, 29, 30, 45 and 46 of the Charter of the OAS, and Articles 2 and 3 of the Inter-American Treaty of Reciprocal Assistance, as well as introduce new principles. These proposals are the result of a serious and valid analysis of inter-American relations and of their normative framework. The Peruvian thesis was based on the premise that the history of the American countries does not justify the supposition of the existence of an "a priori" continental unity, as is maintained in the Preamble and the first two chapters of the Charter of Bogotá. On the contrary, there is a clear distinction between the United States, as a developed nation, with its worldwide interests and responsibilities, and the countries of Latin America, with their need to identify themselves with the community of developing nations.

A new inter-American system should take into account these facts. Its objective should be to eliminate U.S. hegemony and establish the formal equality of countries within the OAS. Inter-American relations are defined as a normative system of contractual character, which must assure peaceful coexistence and cooperation for development, retaining the juridical ascendancy of Latin American law. Inter-American solidarity is only possible,

as far as this Peruvian proposal is concerned, if it is assumed as a defined juridical obligation and not in the vague way that it is mentioned in the Preamble and Article 3 of the OAS Charter.

In addition, the current Charter is based upon a general moral concept of solidarity and seeks to outline the requirements for the effective exercise of representative democracy. According to the Peruvian document, the imposition of a specific type of political organization is not conceivable since this would violate the principles of autonomy, equality and nonintervention. The goal of international systems is not merely to maintain a certain order but to assure peace and cooperation. Therefore, Peru proposes the acceptance of the principle of ideological, political, economic and social pluralism as a way of preserving each country's individuality. Such a principle recognizes the obligation of nonintervention and the right to freedom from intervention. It also proposes widening the concept contained in subsection (b) of Article 3 of the Charter to incorporate the principle of peaceful life since peace is considered to be the condition and, at the same time, the expression of international cooperation.

As regards the defensive solidarity mentioned in subsection (f) of Article 3 of the Charter and specified in Articles 2 and 3 of the Rio Treaty, it is understood that such a concept is ruled by the principles of nonintervention and autonomy. For that reason, the proposal suggests defining the concept of aggression more precisely and creating a system of collective economic security.

The Peruvian document also recommends a reaffirmation of the will to keep Latin America free of nuclear weapons, as well as the adoption of the Stockholm Declaration of 1972 on the environment. It asserts the right of those countries that are members of the inter-American system to participate in worldwide economic decisions, the appropriateness of private foreign investment to national plans of development and the necessity of creating a culture that promotes liberation and development. The lecture given by Llosa when he became a member of the Sociedad Bolivariana del Perú, entitled "La Reestructuración del Sistema Interamericano a la luz del pensamiento de Bolívar," closes this book and it is the most interesting part. In it, the author displays the depth and breadth of his knowledge of Latin American history. He examines the problems that afflict the inter-American system and puts forward solutions.

The merit of this work is that apart from letting us know the position of one country with regard to the problem of inter-American relations, it helps us to think the problem over very carefully.

RICARDO GUILLERMO SIGWALD
Of the Buenos Aires Bar

The Palestine Problem in International Law and World Order. By W. Thomas Mallison and Sally V. Mallison. Essex, England: Longman Group Ltd., 1986. Pp. xvi, 564. Index. \$39.95.

There is a paucity of careful analysis of the basic legal issues in the Arab-Israeli conflict. In this country most of the analysis that has appeared supports

the Zionist position. The Mallisons give greater weight to the Palestinian Arab arguments. Their anti-Zionist conclusions put this book at odds with most of the legal writing on the topic.

Much of the analysis the authors provide has appeared in articles they have published in law reviews and UN documents. The primary value of the book is that it marshals arguments on key issues to call for a particular solution to the conflict. The authors' previous writings have provoked controversy, in particular a caustic attack by Professor Julius Stone in his 1981 book *Israel and Palestine: Assault on the Law of Nations*.

The authors, both distinguished scholars on the Middle East, set for themselves the formidable task of finding through application of international law a solution to the Arab-Israeli conflict. They urge a two-state solution—a Palestinian state in the West Bank and Gaza Strip alongside Israel.

They view this solution as the best remedy for the lack of order in the lives of Palestinians and Israelis:

[T]he Palestinians who have been the victims of organized Zionist terror since the time of the Balfour Declaration and who have been victimized by the Government of Israel's highly institutionalized state terror since 1948 have not received the benefits of a minimum order system. In the same way, those Israelis who have been the victims of the Palestinian responding violence have not received the benefits of such a system [p. 16].

To achieve a two-state solution, the authors suggest collective pressure on Israel:

If there is any single point that has been made most clearly in the world community dealings with the State of Israel and Zionist nationalism over a period of more than three decades, it is that there will be no solution of the Palestine problem until effective sanctions are applied to the Government of Israel [p. 420].

Viewing the UN Security Council as unlikely to accomplish this because of U.S. veto power, they urge sanctions organized by the General Assembly.

But recognizing the ineffectiveness of sanctions without U.S. participation, they state:

[I]t may be hoped that the combination of world community pressure and the increasing economic drain of support for Israel on the United States will bring it back to the principled position taken by President Eisenhower when Israel refused to withdraw from Suez in response to the United Nations demand in 1957 [p. 422].

The authors recognize that a solution effected through collective coercion would be "imposed," and therefore potentially unstable. But they view the status quo as an "imposed settlement by the military power of the Government of Israel" (p. 421). They argue that coercion is appropriate because the "absence of elementary justice in the military settlement now imposed upon Palestine leads to the great and increasing use of coercion" (p. 422). They view Israel's 1982 invasion of Lebanon (to which they devote ch. 7) as "further evidence that the Zionist-Israel aggression will continue until international action is taken to stop it" (p. 419).

To show the injustice of the imposition of Zionism on the people of Palestine, the authors argue (ch. 2) that Jews do not constitute a nation in the international law sense. In support, they quote a U.S. State Department statement that it "does not regard the 'Jewish people' concept as a concept of international law" (p. 84). They analyze in that context the Zionist fundraising organizations and conclude that their tax-exempt status in U.S. law is inappropriate since they are legally creatures of the Government of Israel and channel funds to it.

To challenge the commonly held notion that the Zionists were "given" a state in Palestine by the League of Nations and United Nations, the authors argue (ch. 1) that the Balfour Declaration (incorporated into Britain's mandate over Palestine) does not authorize a Jewish state unless due consideration is given to the rights of the (then) majority inhabitants of Palestine. Regarding the UN General Assembly's 1947 resolution recommending partition of Palestine into Jewish and Arab states (the topic of ch. 3), they find in it no basis for a Jewish state that gives preference to Jews over others. They point out that the resolution contemplated states in which equality of all before the law would prevail. Characterizing Israel as an "exclusivist state" (they cite its Law of Return, which gives preference to Jews in immigration, pp. 164-65), they find that the partition resolution does not constitute a legal basis for it.

On the other side of the equation, the authors find that the Arabs of Palestine enjoy a right as individuals to return to their homeland and a right as a nation to exercise self-determination there (ch. 4). They find authority for establishment of a Gaza-West Bank state in various UN resolutions, including Security Council Resolution 242 of 1967.

On the issue of Jerusalem (the topic of ch. 5), the authors suggest an east-west division that would legitimize Israel's control of the western side (most states do not recognize Israel's claim to west Jerusalem) and that would allocate the eastern side to the Palestinian state to be established. On Israel's control of the Gaza Strip and West Bank, they argue (ch. 6) that Israel violates international law by remaining there and by maintaining civilian settlements there. They find and analyze violations by Israel of humanitarian law in both the West Bank and the Gaza Strip, and in Lebanon.

A number of the issues raised merit further exploration. The authors argue that the Jews do not constitute a nation, yet concede the legitimacy of Israel within the 1949 armistice lines. If the Jews do not constitute a nation, this conclusion as to entitlement requires further explanation. In support of this conclusion, they accord validity to the Balfour Declaration and the partition resolution but do not explain why these two documents serve as an underpinning for a Jewish state (even a hypothetical nonexclusivist one), given the right to self-determination of the Arab population of Palestine. The authors' reliance on Security Council Resolution 242 as legitimizing Israel within the 1949 armistice lines is not adequately explained in light of the apparent contradiction between that interpretation of the resolution and the right of the Palestinian Arabs to return to Palestine and to exercise self-determination there.

These analytical loose ends notwithstanding, this book represents a major advance in the search for a solution to the Arab-Israeli conflict in that it focuses much-needed attention on the underlying legal issues, and in particular on the competing claims to sovereignty over Palestine.

JOHN QUIGLEY

College of Law, Ohio State University

The Palestine Yearbook of International Law. Volume I, 1984. Nicosia: Al-Shaybani Society of International Law Ltd., 1984. Pp. 267. \$25.

The editor proposes a formidable goal: to provide a forum for objective legal analysis to identify, explore and develop methods of utilizing law as an instrument of peace in Palestine. This goal is somewhat contradicted by the final paragraph of the introduction, in which the editor disclaims detachment and states that "objectivity does not imply a neutral position between the aggressor and the victim." Despite provocative terms such as "aggressor" (i.e., Israel) and "victim" (i.e., Palestinians), the *Yearbook* strives for a level of objectivity. The editor's statement that the problem-solving tool of law was never utilized by decision makers as an effective policy alternative to violence is misleading since Israel (and the Arab states, from time to time) has explained, if not planned, foreign policy decisions in terms of international law.

The volume is divided into two sections. The first consists of articles on legal topics. In *Legal Systems and Developments in Palestine*, Annis F. Kassim surveys the different legal systems in Palestine from Ottoman rule to the present. The article covers too much ground with little depth. Sally V. Mallison and W. Thomas Mallison, Jr.'s article on *The Juridical Bases for Palestinian Self-Determination* is based upon a biased assumption against Jewish self-determination. *Autonomy and the Palestinians: A Survey*, by David H. Ott, examines several autonomy and power-sharing proposals (such as an article by Hannum and Lillich and the New Ireland Forum Report) rather than systematically discussing and comparing various theoretical legal categories (i.e., public and private international leases, condominiums, commission-style governments, joint sovereignty regimes, UN trusts, etc.) and their practical outcome. Any discussion of joint rule in Palestine may be moot since a precondition of success is normalized relations between the ruling powers and the determination of all parties to succeed in the endeavor. John Quigley, in *United States Complicity in Israel's Violation of Palestinian Rights*, analyzes why the United States may be obliged to rectify alleged Israeli violations of international law and to offer Palestinians reparations for said Israeli actions.

The second section consists of juridical decisions and political-legal documents. A source of previously untranslated Hebrew and Arabic documents in English would be welcome. However, there seems to be no theme to the presentation except for presenting Israel in a negative light. Furthermore, many of the court cases, and the Karp report and the UN report on Lebanon, have been widely reported on and reprinted in other journals and the popular press.

All of the articles share common problems. Generally, except for UN documents and English sources, the footnotes cite secondary, rather than primary, sources. The historical background of the articles is often either weak or highly selective. For example, the authors ignore the division of Palestine into Transjordan and the territory covered by the partition resolution, the impact of that division and the effect on Palestinian nationalism of Jordanian and Egyptian rule of the West Bank and the Gaza Strip, respectively. While the issues are discussed in a scholarly manner, little or no analysis is made of the underlying assumptions. However, in comparison to other partisan works, the articles are well written, footnoted (although not with the thoroughness of law school journals) and make some attempt at objectivity and presenting Israeli positions. The first volume of what is intended to be an ongoing series shows promise and we look forward to future issues.

LAWRENCE A. KLETTER
Of the Massachusetts Bar

Judicial Independence: The Contemporary Debate. Edited by Shimon Shetreet and Jules Deschênes. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xix, 700. Index. Dfl.245; \$83.50; £67.95.

The importance of independent and impartial judges is as great in international adjudication as in national judiciaries. Distrust of the fairness of the International Court of Justice seems to have motivated the U.S. withdrawal from that Court. Two chapters of this book deal specifically with international judges (pp. 447-49, 496-511). Part I of the volume contains 26 country studies by 45 authors, dealing with non-Communist nations from Australia to Uruguay. The U.S. report is by former Dean Robert B. McKay of New York University and James M. Parkinson, New Jersey court administrator. The project originated at the International Bar Association's (IBA) Berlin meeting in 1980. Chief Justice Leonard King of South Australia and Judge David K. Haese of the family court of Australia presided over the sessions. The country studies followed the pattern of a questionnaire prepared by Professor Shimon Shetreet of the Hebrew University of Jerusalem, who then as rapporteur summarized the country studies and prepared a draft of Minimum Standards of Judicial Independence. After discussion and amendment, it was adopted at the New Delhi meeting in 1982 (which Dr. Shetreet did not attend since the Indian Government professed inability to assure the safety of the conference if any Israelis participated). The text of the IBA standards appears at pages 388-92. The standards stress not only the independence of the individual judge but of the judiciary as a whole vis-à-vis other branches of government.

The effect of local diversity is striking when the country reports are compared. As Lord Lane remarks, "Just as the bumble-bee is said to be an aerodynamic impossibility, so the Lord Chancellor is a constitutional impossibility" (p. 526). He is head of the judiciary but also a political figure and participant in the legislative process. Yet nowhere is the independence of judges better assured than in England. In continental countries it is con-

sidered essential that the assignment of cases to judges be regulated in advance so that a litigant's case will automatically come before its "natural judge" (*juge naturel, gesetzlicher Richter*), predetermined by rules existing before the case arose, without any possibility of arbitrary manipulation (pp. 617-20). In common law countries the allocation of cases is usually regarded as merely a matter of convenience or expediency, judges being considered as fungible. Yet all freedom-loving nations are faithful, after their fashion, to the principle of judicial independence. Many aspects of this weighty theme are usefully reviewed in this interesting volume.

EDWARD DUMBAULD
U.S. Senior District Judge

BRIEFER NOTICES

Boycott and Blacklist: A History of Arab Economic Warfare Against Israel. By Aaron J. Sarna. (Totowa, N.J.: Rowman & Littlefield, 1986. Pp. xiv, 270. Index. \$34.95.) In describing the history of economic warfare by Arab countries against Israel, the author emphasizes the attempt of the last few decades to impose a secondary as well as a primary boycott and to enforce such a plan through devices such as questionnaires and blacklists. The story, in its main outlines, is a familiar one, recounted in reports of congressional hearings, statements of executive officials, comprehensive updates (such as the regular issues of the *Boycott Report*) generated by Jewish organizations in this country, the periodical literature and several books.

This book starts with the history of the boycott, its purposes and methods and effects, and briefly assesses its consistency with international law. It then moves to a description of responses by different nations or regional groupings, including the United States, Canada, Japan, the EEC and some Third World countries. Appendixes set forth the texts of key provisions of the boycott laws themselves and of national responses.

The author at once describes and judges. His criticism of the boycott from both moral and legal perspectives is relentless throughout. At several points, the author distinguishes the Arab boycott, in its purposes as well as methods, from other international boycotts that stemmed from decisions of international organs, served more acceptable purposes or were less intrusive in seeking to affect behavior within targeted countries.

The text is rapid and comprehensive rather than selective and probing in its examination of the boycott. It is well organized, its themes clearly stated. But it does not seek to break new ground, either by finding novel information or by developing insights or a distinctive analytic or judgmental framework. The book's principal value lies in its telling the complete tale in more than outline form, in drawing upon many sources and drawing together diverse criticisms of this economic warfare. It goes beyond the selective description and analysis of many of the particular, focused articles.

The author succeeds in giving a sense of the political choices confronting national governments, the different forces at work that seek to shape a response to the boycott and the different responses that countries have gen-

erated. After all these years, the boycott—however riddled with tactical exceptions, compromises and retreats—survives. But, as the book indicates, it remains far shy of its goals. The analyst can gain only an indeterminate account of its successes and failures. The boycott has brought harm to Israel, but it has also benefited Israel. It has also brought considerable economic harm to other countries, including the very perpetrators of the boycott.

HENRY J. STEINER
Harvard Law School

International Regulation of Transnational Corporations: The New Reality. By Kwamena Acquah. (New York, Westport, London: Praeger Publishers, 1986. Pp. xx, 213. Index. \$37.95.) This short and over-priced book is stated to be a revision of a Ph.D. thesis. It is, however, characterized by a point of view that is stated at the outset, and not after analysis of the problem and alternative solutions. The author includes a series of brief and often incorrect examples of institutional arrangements, which, in the author's opinion, do not—as the author thinks they should—advance the cause of Third World regulation of transnational corporations. The author advances the thesis that global arrangements will not produce the regulation he favors. He gives several examples of regional organizations, such as the Andean Group, and some that he treats as regional, like the Organisation for Economic Cooperation and Development. But he fails either to define the way in which effective regional regulation would attain the massive transfer of resources from transnational corporations to developing nations, which he advocates, or to demonstrate how and why existing nonglobal organizations have not moved the world toward that goal. Along the way, he offers a thumbnail sketch of the GATT (which is as inadequate as it is brief), mentions other organizations like those on postal and telecommunications arrangements, which seem here largely irrelevant, and writes an analysis of the difficulties confronting completion of a code of conduct in the UN Commission on Transnational Corporations, which somehow omits such obviously important difficulties as expropriation and compensation or jurisdiction. It also omits any mention of the concerns of the so-called socialist (that is, Eastern European nations and China) countries, which have, of course, played an important role in the UN Commission on TNCs.

There are, of course, real reasons for pessimism regarding the completion of a code of conduct in the framework of a "global" organization, and there may be some better chances of attaining a more equitable flow of resources to developing countries via regional (or even bilateral) arrangements. But they are not to be found here.

SEYMOUR J. RUBIN
Board of Editors

Hydra of Carnage. The International Linkages of Terrorism and Other Low-Intensity Operations: The Witnesses Speak. Edited by Uri Ra'anan, Robert L. Pfaltzgraff, Jr., Richard H. Shultz, Ernst Halperin and Igor Lukes. (Lexington and Toronto: D.C. Heath and Company, 1986. Pp. xvii, 638. Index. \$22.95.) This book consists of 18 essays and about three hundred pages of selected documents. A product of the International Security Studies Program of the Fletcher School of Law and Diplomacy, it addresses a topic, inter-

national terrorism, which is of considerable current interest to international lawyers, but it does not purport to speak in the language of lawyers, and its essayists only rarely touch on legal issues. When they do, they are almost invariably ill-informed and conclusory. The views expressed on the whole appear to reflect those of the Reagan administration, although the language in which they are expressed would not commend itself to any government public relations officer. To this reviewer, the most distressing thing about this collection is its effort to define terrorism as acts committed against American interests or democratic societies rather than acts committed against innocent persons by any group for terrorist purposes. Calls for transcending "legalistic notions and hypermoralism" and for the United States to engage in "dezinformatsia" or a broad scope of active measures, both overt and covert, sound rather too much like the Soviets and suggest that the editors think law is part of the problem, rather than part of any solution.

The documents provide useful source material and are particularly persuasive with respect to the growing involvement of terrorist groups in the international drug traffic. There are also documents on Central America, Grenada, the Middle East, Europe and Africa. If you have ever wanted to read a PLO memorandum of conversation of a meeting between Arafat and Gromyko, here is your chance.

GEORGE H. ALDRICH

Member, Iran-U.S. Claims Tribunal

Basic Documents on International Trade Law. Edited by Chia-Jui Cheng. (Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1986. Pp. xii, 753. Index. Cloth: Dfl.350; \$142; £96.95. Paper: Dfl.75; \$25.) This 750-page volume is intended to include "all the most important documents of the laws of international commercial transactions, based on the topics selected by the United Nations Commission on International Trade Law (UNCITRAL)." Emphasis is needed on "transactions" since none of the important government regulatory treaties such as the GATT or commodity agreements is included. The volume contains, in seven parts, international documents on sale of goods, transport, payments, insurance, industrial property, conflict of laws and conciliation and arbitration. Any selection of this type can, of course, be challenged. For example, no categories of banking, securities or tax are included and although EEC rules of competition law are included, important multilateral international documents on monopolies (such as the UNCTAD or OECD rules) are not, perhaps because they are not "binding." For its modest objectives, largely focused on the UNCITRAL work, however, the volume can prove to be very useful. Indeed, the foreword is correct that many of these documents are frequently used by lawyers, yet are often relatively difficult to come by.

JOHN H. JACKSON

Board of Editors

Miscellanea Georges Van Hecke: Selected writings. (Antwerp: Kluwer rechtswetenschappen, 1985. Pp. xviii, 334.) This volume was published on the occasion of the retirement of Georges Van Hecke, professor of law at the Faculty of Law of the Catholic University at Louvain, Belgium. It constitutes a reprint of 33 selected articles published by him during the period 1943-1983. The articles are reproduced in the original languages in which they were written: Dutch, French, English and German.

These writings are a manifestation of the breadth of the legal field covered by Professor Van Hecke during his long and distinguished career as a teacher and practitioner of law. Approximately half of the writings deal with questions of international law. These are mainly in the area of conflict of laws; a few deal with public international law and the law of the European Economic Community. Especially noteworthy for the readers of this *Journal* are the articles on government enterprises and national monopolies under the EEC Treaty (pp. 113-23); nationality of companies (pp. 181-95); confiscation, expropriation and conflict of laws (pp. 239-50); and contracts subject to international or transnational law (pp. 299-312). Several of the writings included in the section on conflict of laws clearly demonstrate that legal issues often involve questions of both conflict of laws and public international law.

The writings contained in this volume have in common only that they were written by the same author. There is no thematic coherence. The book is simply a convenient source of materials that would otherwise still be scattered over a large number of—sometimes not easily accessible—publications. Many of the writings are obviously now outdated; some, however, still have more than mere historical value. The book is a tribute to an eminent jurist, and derives its value mainly from that fact.

ALFRED H. A. SOONS
Erasmus University, Rotterdam

Anuario de estudios sociales y jurídicos X-XI, 1981-1982. (Granada: Escuela Social de Granada, 1983. Pp. 656.) This issue of the yearbook of social and legal studies of the School of Social Studies of the University of Granada, Spain, is dedicated to the retiring professor of administrative law, Mesa-Moles Segura. The volume contains some 18 contributions by Spanish scholars, mostly jurists, on various topics in the areas of constitutional, administrative, labor and procedural law, as well as two papers on political violence and political elites in Andalusia, respectively, of interest to political scientists. Thus, while the bulk of the items relate to comparative law, only one study (33 pages), by Luisa Espada Ramos who teaches international law in Granada, comes within the scope of international law. Entitled *The Objective Responsibility for Damage in Contemporary International Law*, it tackles the very controversial and—as dramatically illustrated by the Chernobyl disaster—very topical issue of international liability for injurious consequences arising out of acts not prohibited by international law. Following a review of the work of the International Law Commission in this area up to 1981, the author explores the legal nature of this liability, focusing on some situations in interstate relations in which it might arise. Included are pollution of the environment, damage caused by objects launched into space and harmful effects of nuclear activities. As evidenced by the current work of the ILC, “objective responsibility” remains one of the major challenges of the Commission and, as noted by the essay’s author, a successful codification or, rather, development of international law in this area would constitute a great step forward in the international rule of law.

BOLESŁAW A. BOCZEK
Kent State University

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* Mention here neither assures nor precludes later review.

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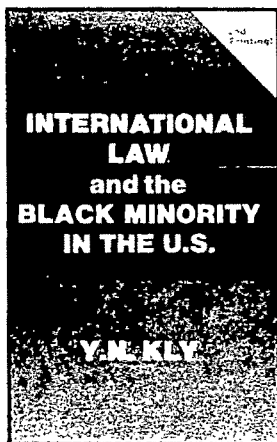
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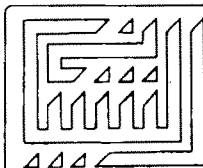
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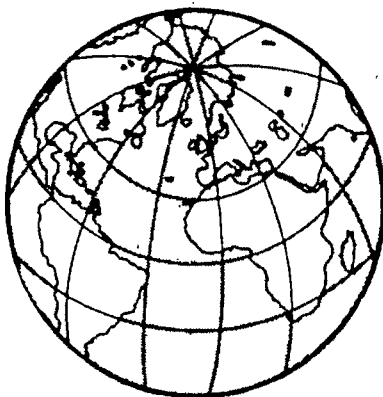
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